TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 152.

NORTHERN PACIFIC RAILWAY COMPANY, JOHN A. MILLER AND ANNA MILLER, HIS WIFE, AND THE WASHINGTON GRAIN AND MILLING COMPANY, PLAINTIFFS IN ERROR,

vs.

JACOB SLAGHT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED NOVEMBER 29, 1905.

(19,997.)

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a NORTHERN PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,

v.

JACOB SLAGHT, Defendant in Error.

Appeal from the Supreme Court of the State of Washington to the Supreme Court of the United States.

[Seal of the Supreme Court, State of Washington.]

b Filed Jan 10 1905.

C. S. REINHART, *Clerk.*
F. S. GUYOT, *Dep.*

Filed in the office of Clerk of Superior Court Dec. 9, 1904.
W. O. McCAW, *Clerk,*
By —— ——, *Deputy.*

1 *Transcript.*

In the Superior Court of the State of Washington in and for the County of Whitman.

Case No. 8085.

JACOB SLAGHT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Appearances.

For Plaintiff: Thomas Neill, Esq., and W. E. McCroskey, Esq.
For Defendants: Messrs. Stephens & Bunn, and James B. Kerr, Esq.

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4 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING COMPANY, a Corporation, Defendants.

Plaintiff complains of the above named defendants and for cause of action alleges:—

1st. That now and at all of the times hereinafter mentioned, the defendant, The Northern Pacific Railway Company, has been and is a corporation organized and existing under the laws of the State of Wisconsin, as a railroad corporation, and as such has been and is operating and conducting a railroad in and through the state of Washington.

2nd. That now and at all of the times hereinafter mentioned the defendants John A. Miller and Anna Miller, have been and are husband and wife.

3rd. That now and at all of the times hereinafter mentioned the defendant, The Washington Grain & Milling Company has been and still is a corporation organized and existing under the laws of the State of Washington.

4th. That the plaintiff is seized in fee simple and has the right and is entitled to the immediate possession of all that certain real property situate, lying and being in Whitman County, State of Washington, particularly described as follows, to-wit,

Commencing at the Northeast corner of Lot one in Block Twenty-seven of Powers addition to the City of Palouse, according
5 to the recorded plat of said Addition now on file in the office of the County Auditor of Whitman County, Washington, and running thence in a straight line to the South-west corner of Block Twenty-three of said Powers Addition; thence along the southerly boundary of Main street in said Powers Addition, to the point where said southerly line of said Main street intersects the East line of Lot ten of Section One in Township Sixteen, North of Range Forty-five East of the Willamette Meridian; thence North to the Northeast corner of said Government Lot Ten; thence West along the North line of said Lot Ten and of Lot Eleven of Section One in Township Sixteen, North of Range Forty-five East of the Willamette Meridian; to a point where said North line of said Government Lot Eleven intersects the South boundary of Railroad street in said Powers Addition; thence along the said South boundary line of said Railroad street in a southerly direction to the terminus of said boundary line of said street, thence in a straight line in the same course and direction to a point in the Palouse River midway between its banks at low water mark; thence down said Palouse River along a line midway between its banks at low water mark, to a point which would be intersected by the Southerly boundary line of Spokane Avenue, in said Powers Addition; if said Spokane Avenue were extended across said river without deviation of course; thence in a straight line to the Northwest corner of Block Thirty-five in said Powers Addition; thence along the South boundary line of said Spokane Avenue to point of beginning, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining.

5th. That the defendants are in possession thereof and withhold the same from plaintiff.

Wherefore plaintiff demands judgment,—

1st. For the possession of said premises.

6 2nd. For his costs and disbursements in this matter expended.

CHARLES M. WYMAN &
W. E. McCROSKEY,
Attorneys for Plaintiff.

STATE OF WASHINGTON, *County of Whitman, ss:*

Jacob Slaght, being first duly sworn, on oath, says: That he is the plaintiff in the above entitled action; that he has read the foregoing amended complaint, knows the contents thereof, and believes the same to be true.

JACOB SLAGHT.

Subscribed and sworn to before me, this 28″ day of May, 1903.

W. E. McCROSKEY,
Notary Public in and for the State of Washington,
Residing at Palouse in Said State.

Served by mail 5/31/02.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 4" day of June 1902. Journal — Page — Execution Docket — W. W. Renfrew, County Clerk.

7 In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Separate Second Amended Answer of Defendant Northern Pacific Railway Company to Amended Complaint.

Comes now defendant Northern Pacific Railway Company, appearing for itself only, and for separate second amended answer to the amended complaint of plaintiff herein, by reason of the order of the court striking from the original answer of this defendant to the amended complaint of plaintiff and the sustaining of the demurrer of plaintiff by the court to the first affirmative defense pleaded in the amended answer of this defendant, and the rules of the court requiring amended pleading when a portion of the original pleading is stricken out or demurrer thereto sustained, and solely for these reasons and without abandonment of, or intention to abandon, the matters stricken out by order of the court or to which a demurrer was sustained by order of the court,—

I.

Denies each and every allegation, matter and thing contained in paragraph numbered "4th" of the amended complaint of plaintiff herein.

II.

Admits that it is in possession of a portion of the property mentioned and described in the amended complaint of plaintiff
8 herein and in this connection alleges that the property of which it is in possession constitutes its right of way upon, over and across government lots ten (10) and eleven (11) of the section mentioned in the amended complaint of plaintiff herein. This defendant denies that it is in possession of, or withholds from plaintiff, any portion of the property described in the amended complaint of plaintiff herein, except its right of way aforesaid.

This defendant admits that defendant John A. Miller is a tenant of defendant Northern Pacific Railway Company and occupies a portion of its said right of way, description of which is shown on plat hereto attached, marked "Exhibit A" and made a part hereof.

This defendant admits that defendant The Washington Grain

and Milling Company is a tenant of defendant Northern Pacific Railway Company and occupies a portion of the premises on its right of way, description of which is shown on plat hereto attached, marked "Exhibit A" and made a part hereof.

This defendant alleges that said tenants occupy separate and distinct parcels and portions of said right of way.

For a first affirmative defense (which was a second affirmative defense in the original amended answer of this defendant), defendant Northern Pacific Railway Company alleges:

I.

That lots ten (10) and eleven (11) of the government survey of section one (1), township sixteen (16) north, of range forty five (45) east of the Willamette Meridian, in Whitman county, Washington, were patented on the twentieth day of April, 1897.

II.

That the action of plaintiff, if any he has against the defendants or either of them, is barred by the statute of limitations; that the action of plaintiff, if any he has against the defendants or either of them, was not commenced within the time authorized or
9 required by law, to-wit, within three (3) years from the time the alleged cause of action arose or existed.

For a second affirmative defense (which was a third affirmative defense in the original amended answer of this defendant), defendant Northern Pacific Railway Company alleges:

I.

That defendant Northern Pacific Railway Company is the owner in fee in its own separate right, and has the right and is entitled to the possession, of the portion of land described in the amended complaint of plaintiff herein, constituting its right of way at Palouse, Washington, in, upon and over lots ten (10) and eleven (11) aforesaid of the government survey, the extent and boundaries of which right of way are shown upon the plat hereto attached, marked "Exhibit A" and made a part hereof.

II.

That defendant Northern Pacific Railway Company is in possession of said premises, which it claims as its right of way, and was in possession thereof at the time of the commencement of this action, but is not in possession of the residue of the premises described in the amended complaint of plaintiff herein and was not in the possession of the premises described in the amended complaint of plaintiff herein other than the said right of way at the time of the commencement of the action herein by the plaintiff.

For a third affirmative defense (which was a fourth affirmative defense in the original amended answer of this defendant), defendant Northern Pacific Railway Company alleges:

That defendant Northern Pacific Railway Company is a railway corporation and a common carrier of freight and passengers, and, in connection with its transcontinental line of railroad, has a
10 branch line from Spokane, Washington, to Lewiston, Idaho, which it maintains and operates upon and over said government lots ten and eleven of section one, referred to in the amended complaint of plaintiff, and the extent of its right of way thereon and thereover is shown by said "Exhibit A," which said premises so shown by said exhibit are owned by defendant Northern Pacific Railway Company as a right of way and are being used by it as such right of way and for railroad purposes and are necessary for the use and operation of the said branch railroad of defendant Northern Pacific Railway Company; that said defendant so occupied said premises and so used the same for a right of way and railroad purposes at the time of the commencement of plaintiff's action herein and for a long time prior thereto.

For a fourth affirmative defense (which was a fifth affirmative defense in the original amended answer of this defendant), defendant Northern Pacific Railway Company alleges:

I.

That the Northern Pacific Railway Company is a corporation organized and incorporated under the laws of the state of Wisconsin.

II.

That said Northern Pacific Railway Company is a railway corporation and a common carrier of freight and passengers and owns and operates a transcontinental line of railroad from St. Paul in the state of Minnesota to and through the state of Washington and to the city of Portland in the state of Oregon; that in connection with said line of transcontinental railroad, it has a branch line from Spokane, Washington, to Lewiston, Idaho, which it maintains and operates upon and over government lots ten and eleven of section one referred to in the amended complaint of plaintiff herein; that the extent of its right of way upon and over said premises is as shown by "Exhibit A" hereto attached and made a part hereof.

11 III.

That the Spokane and Palouse Railway Company, at all the times herein mentioned, was, and still is, a corporation organized and incorporated under the laws of the state of Washington.

IV.

That the Spokane and Palouse Railway Company built said branch line of railroad from Spokane, Washington, to Lewiston, Idaho, and in doing so expended large sums of money and was at great cost and expense in so doing.

V.

That after the construction of said road between Spokane, Washington, and Lewiston, Idaho, the Spokane and Palouse Railway Company maintained and operated the same from the time of construction thereof until the 21st day of February, 1899, at which time, for a valuable consideration, the Spokane and Palouse Railway Company conveyed the said railroad, right of way and all its property to the Northern Pacific Railway Company.

VI.

That ever since said Northern Pacific Railway Company acquired said railroad and right of way and matters and things incident thereto, it has maintained and operated the same.

VII.

That ever since the commencement of the operation of said road it has been daily and continuously operated, and freight and passengers have been daily and continuously, since the commencement of the operation of said road, carried upon and over the said road and to and through the town of Palouse, Washington, where the land in controversy in this action is situated.

VIII.

That at the time of the construction of said railroad plain-
12 tiff was a resident in or about the said town of Palouse, Washington, and had full knowledge and notice that the said road was being constructed and that large sums of money were being expended and paid out on account of the construction of said railroad and that the said railroad was being built for the purpose of carrying freight and passengers thereon and thereover, and that when constructed it would be the imperative duty of the owner thereof to carry freight and passengers upon and over said road to and from all points, and, necessarily, upon and over the premises in controversy in this action.

IX.

That at the time of the erection or construction of said railroad, plaintiff, with the knowledge and notice aforesaid, did not make any objection to the building or construction of said road, or object to the maintenance or operation thereof, and did not bring any suit or action to prevent the erection or construction of the said railroad upon or over the premises in controversy in this action, but, on the contrary, acquiesced in the erection, construction, completion, maintenance and operation upon and over said premises until after patent issued to the land in controversy upon the date hereinbefore stated.

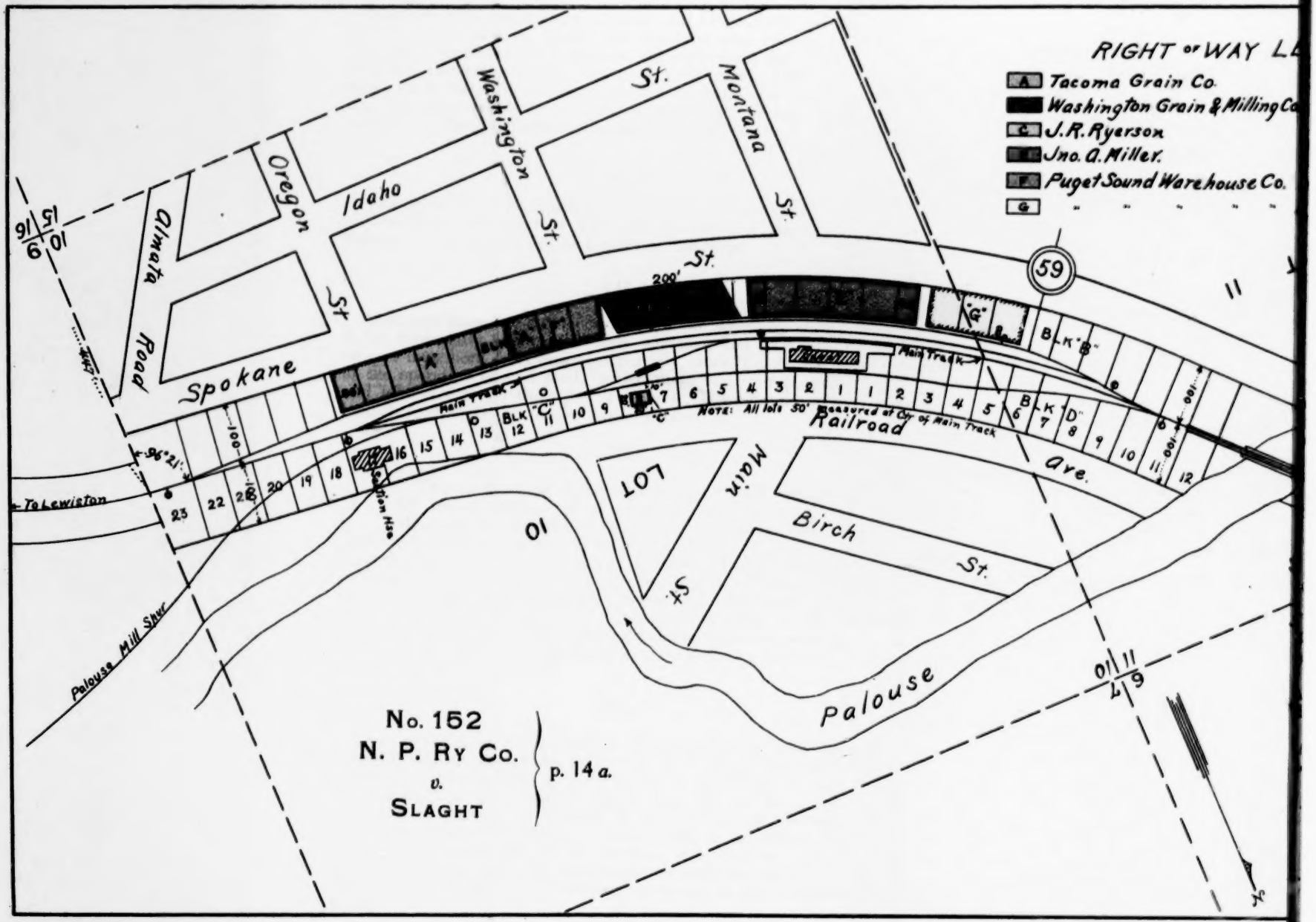

RIGHT OF WAY L
A Tacoma Grain Co.
Washington Grain & Milling Co
C J.R. Ryerson
Jno. A. Miller.
Puget Sound Warehouse Co.
G
Washington St.
Montana St.
Oregon
Idaho
Almata Road
Spokane St.
200' St.
59
Main Track
Railroad Ave.
NOTE: All lots 50' measured at Ry of Main Track
Main St.
Birch St.
LOT
Palouse
Palouse Mill Shw
To Lewiston
Section Line
No. 152
N. P. Ry Co.
v.
Slaght
p. 14 a.

Exhibit "A"

RIGHT OF WAY LEASED

A	Tacoma Grain Co.	June 1st 1899, 5 years.
B	Washington Grain & Milling Co.	May 1st 1896, 8 years.
C	J. R. Ryerson	Jan. 1st 1898, 4 years.
D	Jno. A. Miller.	Dec. 1st 1898, 5 years.
E	Puget Sound Warehouse Co.	May 1st 1900, 5 years.
G	" " " " "	Nov. 1st 1899, 6 years.

N. P. R.
Idaho Div. P & L Br.
Map showing
R. of W. through Gov. Lots 10 & 11.
Sec 1, Twp 16N, Range 45E, W.M.
of Palouse, Wn.
Scale 1"=200'
Office of Div Engr, Tacoma, Wn. Dec. 4, 1901.

X.

That without any objection on the part of plaintiff there has been constructed upon said right of way on the premises in controversy valuable and lasting improvements in the shape of depot, water tank and warehouses which would be practically of no value should the road and right of way of defendant be changed from the premises in controversy.

Wherefore, defendant prays that plaintiff have and take nothing by his action herein, and that defendant Railway Company be adjudged the owner of said right of way; that plaintiff go
13 hence without day, and that this defendant have and recover of and from plaintiff its costs and disbursements herein.

STEPHENS & BUNN,
Attorneys for Defendant Northern Pacific Railway Company.

JAMES B. KERR,
Of Counsel.

STATE OF WASHINGTON, *County of Spokane, ss:*

Jno. W. Hill, being first duly sworn, upon oath, deposes and says: That he is general agent of and for the Northern Pacific Railway Company, a corporation, defendant in the above-entitled action, having his office and residing at and in the city of Spokane, Washington; that he makes this affidavit of verification for and on behalf of said company; that he has read the foregoing second amended answer to amended complaint, knows the contents thereof, and the same is true as he verily believes.

JNO. W. HILL.

Subscribed and sworn to before me this 22nd day of January, 1903.

E. T. WHITE,
Notary Public in and for the State of Washington,
[SEAL.] *Residing at Spokane, Washington.*

Due service of within separate 2nd Amended Answer to Amended Complaint by receipt of a true copy thereof is admitted this 24 day of January, 1903.

THOMAS NEILL,
Attorney for Pl't'ff.

14 Endorsed: Filed January 24, 1903. W. O. McCaw, Clerk.

(Here follows diagram marked p. 14*a*.)

15 In the Superior Court of the State of Washington in and for the County of Whitman.

No —.

JACOB SLAGHT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Separate Second Amended Answer of Defendant The Washington Grain and Milling Company to Amended Complaint.

Comes now defendant The Washington Grain and Milling Company, appearing for itself only, and for separate second amended answer to the amended complaint of plaintiff herein, by reason of the order of the court striking from the original answer of this defendant to the amended complaint of plaintiff and the sustaining of the demurrer of plaintiff by the court to the first affirmative defense pleaded in the amended answer of this defendant, and the rule of the court requiring amended pleading when a portion of the original pleading is stricken out or demurrer thereto sustained, and solely for these reasons and without abandonment of, or intention to abandon, the matters stricken out by order of the court or to which a demurrer was sustained by order of the court,—

I.

Denies each and every allegation, matter and thing contained in paragraph numbered "4th" of the amended complaint of plaintiff herein.

II.

Admits that defendant Northern Pacific Railway Company is in possession of a portion of the property mentioned and described in the amended complaint of plaintiff herein, and in this con-
16 nection alleges that the property of which said Railway Company is in possession constitutes its right of way upon, over and across government lots ten (10) and eleven (11) of the section mentioned in the amended complaint of plaintiff herein.

This defendant denies that said Railway Company or either of the defendants is in possession of, or withholds from plaintiff, any portion of the property described in the amended complaint of plaintiff herein, except the right of way aforesaid.

This defendant admits that defendant John A. Miller occupies a portion of said right of way, description of which is shown on plat hereto attached, marked "Exhibit A" and made a part hereof.

This defendant admits it is a lessee of defendant Northern Pacific Railway Company, and as such is in possession of a portion of the premises described in the amended complaint of plaintiff herein and

a portion of the right of way of defendant Northern Pacific Railway Company, description of which is shown on plat hereto attached, marked "Exhibit A" and made a part hereof.

Defendant alleges that defendants John A. Miller and The Washington Grain and Milling Company occupy separate and distinct portions and parcels of the right of way of defendant Northern Pacific Railway Company upon and over government lots ten and eleven of said section.

For a first affirmative defense (which was a second affirmative defense in the original amended answer of this defendant), defendant The Washington Grain and Milling Company alleges:

I.

That lots ten (10) and eleven (11) of the government survey of section one (1), township sixteen (16) north, of range forty-five (45) east of the Willamette meridian, in Whitman County, Washington, were patented on the twentieth day of April, 1897.

17

II.

That the action of plaintiff, if any he has against defendants or either of them, is barred by the statute of limitations; that the action of plaintiff, if any he has against the defendants or either of them, was not commenced within the time authorized or required by law, to-wit, within three (3) years from the time the alleged cause of action arose or existed.

For a second affirmative defense (which was a third affirmative defense in the original amended answer of this defendant), defendant The Washington Grain and Milling Company alleges:

I.

That defendant Northern Pacific Railway Company is the owner in fee in its own separate right, and has the right and is entitled to the possession, of the portion of land described in the amended complaint of plaintiff herein, constituting its right of way at Palouse, Washington, in, upon and over lots ten (10) and eleven (11) aforesaid of the government survey, the extent and boundaries of which right of way are shown upon the plat hereto attached, marked "Exhibit A" and made a part hereof.

II.

That defendant Northern Pacific Railway Company is in possession of said premises, which it claims as its right of way, and was in possession thereof at the time of the commencement of this action but is not in possession of the residue of the premises described in the amended complaint of plaintiff herein and was not in the possession of the premises described in the amended complaint of plaintiff herein other than the said right of way at the time of the commencement of the action herein by plaintiff.

18 For a third affirmative defense (which was a fourth affirmative defense in the original amended answer of this defendant), defendant The Washington Grain and Milling Company alleges:

That defendant Northern Pacific Railway Company is a railway corporation and a common carrier of freight and passengers, and, in connection with its transcontinental line of railroad, has a branch line from Spokane, Washington, to Lewiston, Idaho, which it maintains and operates upon and over said government lots ten and eleven of section one, referred to in the amended complaint of plaintiff, and the extent of its right of way thereon and thereover is shown by said "Exhibit A," which said premises so shown by said exhibit are owned by defendant Northern Pacific Railway Company as a right of way and are being used by it as such right of way and for railroad purposes and are necessary for the use and operation of the said branch railroad of defendant Northern Pacific Railway Company; that said defendant so occupied said premises and so used the same for a right of way and railroad purposes at the time of the commencement of plaintiff's action herein and for a long time prior thereto.

For a fourth affirmative defense (which was a fifth affirmative defense in the original amended answer of this defendant), defendant The Washington Grain and Milling Company alleges:

I.

That the Northern Pacific Railway Company is a corporation organized and incorporated under the laws of the state of Wisconsin.

II.

That said Northern Pacific Railway Company is a railway corporation and a common carrier of freight and passengers and owns and operates a transcontinental line of railroad from St. Paul,
19 in the state of Minnesota, to and through the state of Washington and to the city of Portland, in the state of Oregon; that in connection with said line of transcontinental railroad, it has a branch line from Spokane, Washington, to Lewiston, Idaho, which it maintains and operates upon and over government lots ten and eleven of section one, referred to in the amended complaint of plaintiff herein; that the extent of its right of way, upon and over said premises is as shown by "Exhibit A," hereto attached and made a part hereof.

III.

That the Spokane and Palouse Railway Company, at all the times herein mentioned, was, and still is, a corporation organized and incorporated under the laws of the State of Washington.

IV.

That the Spokane and Palouse Railway Company built said branch line of railroad from Spokane, Washington, to Lewiston, Idaho, and

in doing so expended large sums of money and was at great cost and expense in so doing.

V.

That after the construction of said road between Spokane, Washington, and Lewiston, Idaho, the Spokane and Palouse Railway Company maintained and operated the same from the time of construction thereof until the 21st day of February, 1899, at which time, for a valuable consideration, the Spokane and Palouse Railway Company conveyed the said railroad, right of way and all its property to the Northern Pacific Railway Company.

VI.

That ever since said Northern Pacific Railway Company acquired said railroad and right of way and matters and things incident thereto, it has maintained and operated the same.

VII.

That ever since the commencement of the operation of said road it has been daily and continuously operated, and freight and passengers have been daily and continuously, since the commencement of the operation of said road, carried upon and over the said road and to and through the town of Palouse, Washington, where the land in controversy in this action is situated.

VIII.

That at the time of the construction of said railroad plaintiff was a resident in or about the said town of Palouse, Washington, and had full knowledge and notice that the said road was being constructed and that large sums of money were being expended and paid out on account of the construction of said railroad and that the said railroad was being built for the purpose of carrying freight and passengers thereon and thereover, and that when constructed it would be the imperative duty of the owner thereof to carry freight and passengers upon and over said road to and from all points, and, necessarily, upon and over the premises in controversy in this action.

IX.

That at the time of the erection or construction of said railroad, plaintiff, with the knowledge and notice aforesaid, did not make any objection to the building or construction of said road, or object to the maintenance or operation thereof, and did not bring any suit or action to prevent the erection or construction of the said railroad upon or over the premises in controversy in this action, but, on the contrary, acquiesced in the erection, construction, completion, maintenance and operation upon and over said premises until after patent issued to the land in controversy upon the date hereinbefore stated.

X.

That without any objection upon the part of plaintiff there
21 has been constructed upon said right of way on the premises in controversy valuable and lasting improvements in the shape of depot, water tank and warehouse, which would be practically of no value should the road and right of way of defendant Northern Pacific Railway Company be changed from the premises in controversy.

Wherefore, defendant prays that plaintiff have and take nothing by his action herein, and that defendant Railway Company be adjudged the owner of said right of way; that plaintiff go hence without day, and that this defendant have and recover of and from plaintiff its costs and disbursements herein.

STEPHENS & BUNN,
Attorneys for Defendant The Washington Grain and Milling Company.

JAMES B. KERR, *Of Counsel.*

STATE OF WASHINGTON, *County of Spokane, ss:*

J. K. Smith, being first duly sworn, upon oath deposes and says: That he is the secretary and treasurer of The Washington Grain and Milling Company, a corporation, one of the defendants in the above entitled action, and makes this affidavit of verification for and on behalf of said company; that he has read the foregoing second amended answer to amended complaint, and knows the contents thereof; and the same is true as he verily believes.

J. K. SMITH.

Subscribed and sworn to before me this 22nd day of January, 1903.

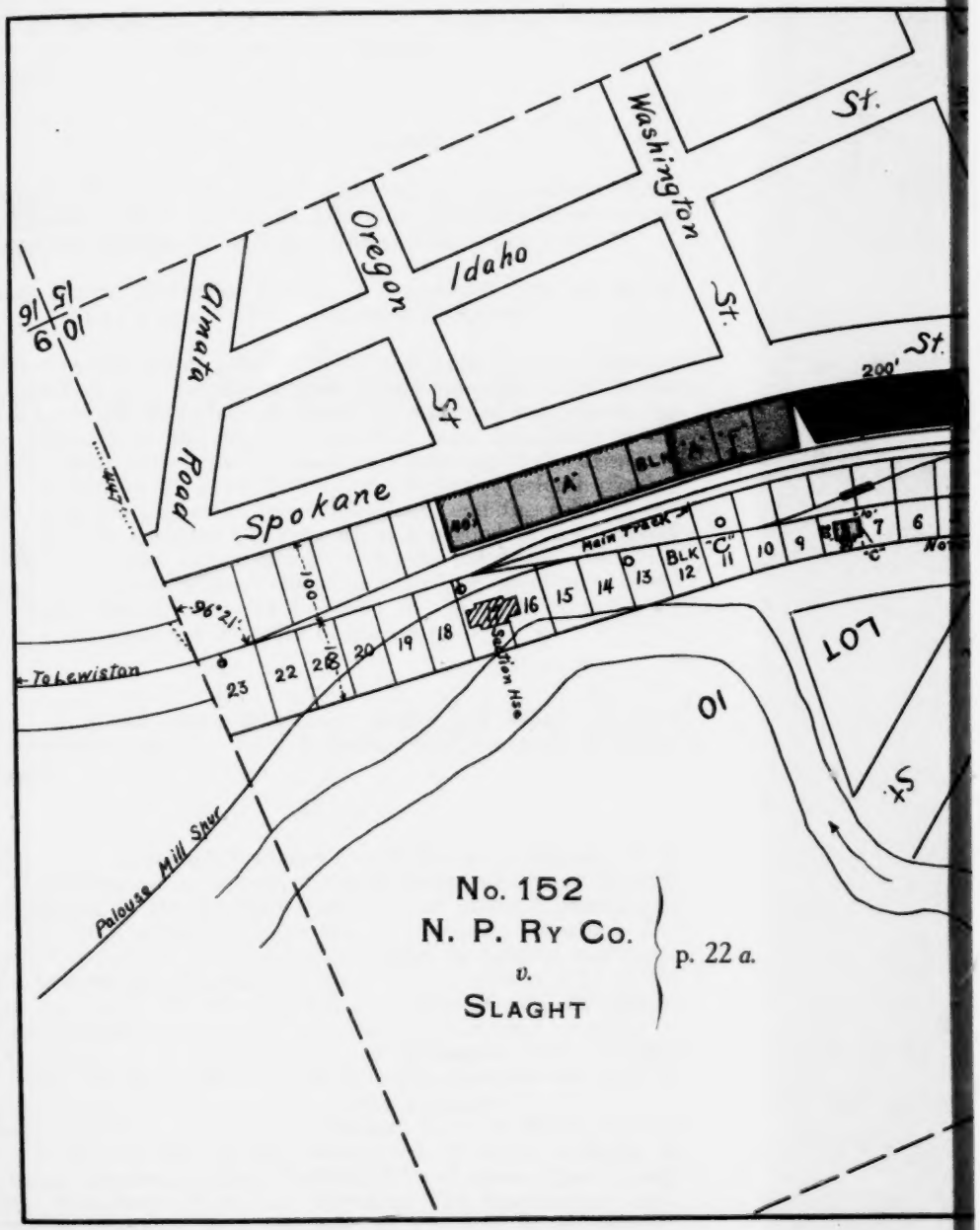
E. T. WHITE,
Notary Public in and for the State of Washington,
[SEAL.] *Residing at Spokane, Washington.*

22 Due service of within Second Amended Answer to Amended Complt. by receipt of a true copy thereof is admitted this — day of January, 1903.

THOMAS NEILL,
Attorney for Pl't'ff.

Endorsed: Filed January 24 1903, W. O. McCaw, Clerk.

(Here follows diagram marked page 22*a*)



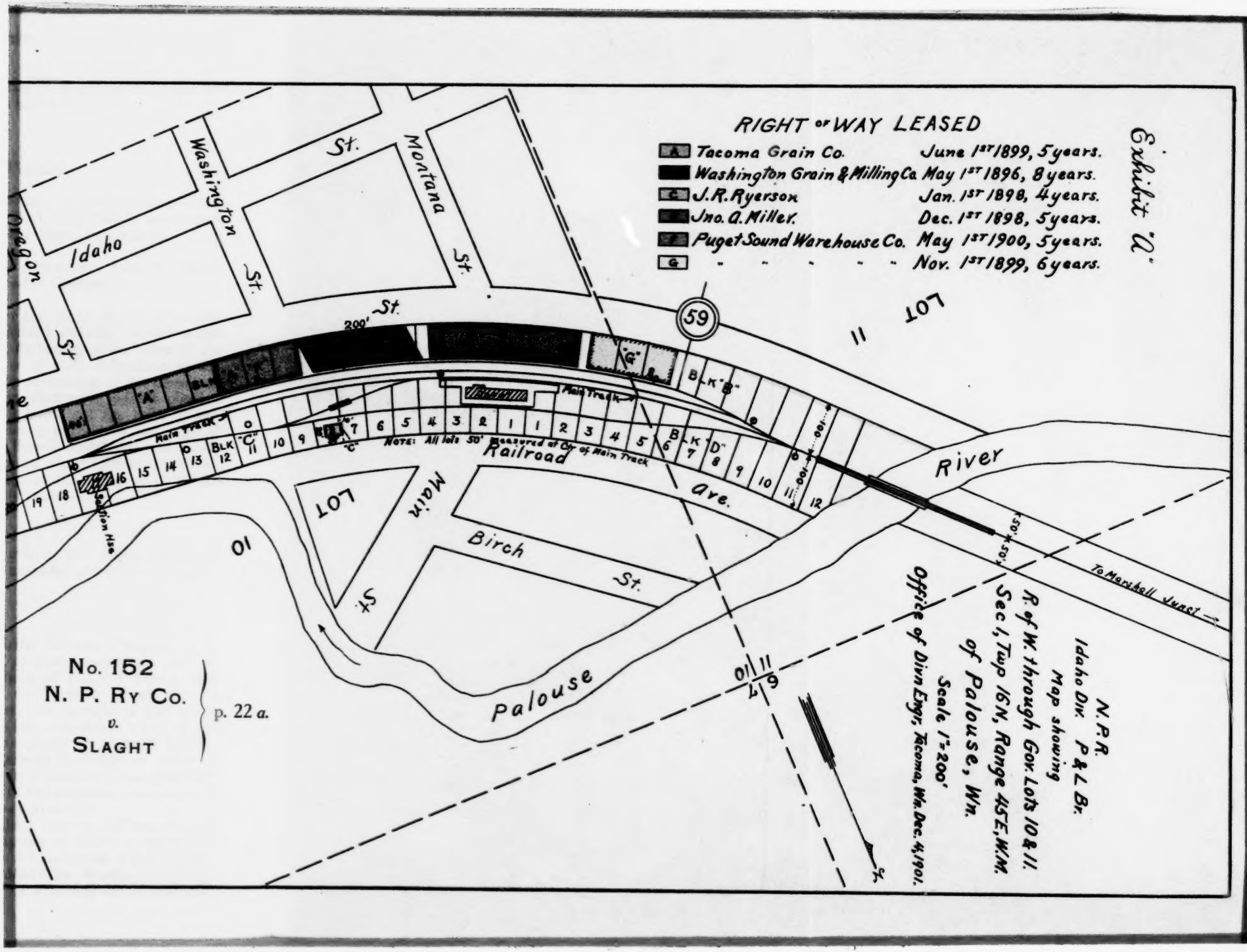


Exhibit "C"
RIGHT OF WAY LEASED
A Tacoma Grain Co. June 1ST 1899, 5 years.
Washington Grain & Milling Co. May 1ST 1896, 8 years.
J.R. Ryerson Jan. 1ST 1898, 4 years.
Jno. A. Miller. Dec. 1ST 1898, 5 years.
Puget Sound Warehouse Co. May 1ST 1900, 5 years.
G . . . . . Nov. 1ST 1899, 6 years.
Oregon St.
Idaho St.
Washington St.
Montana St.
200' St.
59
LOT 11
Main Track
Railroad
Ave.
River
Main St.
LOT 10
Birch St.
Palouse
To Marshall Junct
Section Hse
Note: All lots 50' measured at Cy of Main Track
N.P.R.
Idaho Div. P & L Br.
Map showing
R. of W. through Gov. Lots 10 & 11.
Sec 1, Twp 16N, Range 45E, W.M.
of Palouse, Wn.
Scale 1"=200'
Office of Div Engr, Tacoma, Wn. Dec. 4, 1901.

No. 152
N. P. Ry Co.
v.
Slaght
p. 22 *a.*

23 In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Separate Second Amended Answer of Defendants John A. Miller and Anna Miller to Amended Complaint.

Come now defendants John A. Miller and Anna Miller, appearing for themselves only, and for separate second amended answer to the amended complaint of plaintiff herein, by reason of the order of the court striking from the original answer of these defendants to the amended complaint of plaintiff and the sustaining of the demurrer of the plaintiff by the court to the first affirmative defense pleaded in the amended answer of these defendants and the rules of the court requiring amended pleading when a portion of the original pleading is stricken out or demurrer thereto sustained, and solely for these reasons and without abandonment of, or intention to abandon, the matters stricken out by order of the court or to which demurrer was sustained by order of the court,—

I.

Deny each and every allegation, matter and thing contained in paragraph numbered "4th" of the amended complaint of plaintiff herein.

II.

Admit that defendant Northern Pacific Railway Company is in possession of a portion of the property mentioned and de-
24 scribed in the amended complaint of plaintiff herein, and in this connection allege that the property of which said Railway Company is in possession constitutes its right of way upon, over and acress government lots ten (10) and eleven (11) of the section mentioned in the amended complaint of plaintiff herein.

These defendants deny that said Railway Company or either of the defendants is in possession of, or withholds from plaintiff, any portion of the property described in the amended complaint of plaintiff herein, except the right of way aforesaid.

These defendants admit that defendant John A. Miller occupies a portion of said right of way, description of which is shown on plat hereto attached, marked "Exhibit A" and made a part hereof.

These defendants admit that defendant The Washington Grain and Milling Company is in possession of a portion of the premises

described in the amended complaint of plaintiff herein, description of which is shown on plat hereto attached, marked "Exhibit A" and made a part hereof.

These defendants allege that defendants John A. Miller and The Washington Grain and Milling Company occupy separate and distinct portions and parcels of the right of way of defendant Northern Pacific Railway Company upon and over government lots ten (10) and eleven (11) of said section.

For a first affirmative defense (which was a second affirmative defense in the original amended answer of these defendants), defendants John A. Miller and Anna Miller allege:

I.

That lots ten (10) and eleven (11) of the government survey of section one (1), Township sixteen (16) north, of range forty five (45) east. of the Willamette Meridian, in Whitman
25 County, Washington, were patented on the twentieth day of April, 1897.

II.

That the action of plaintiff, if any he has against defendants or either of them, is barred by the statute of limitation; that the action of plaintiff, if any he has against the defendants or either of them, was not commenced within the time authorized or required by law, to-wit, within three (3) years from the time the alleged cause of action arose or existed.

For a second affirmative defense (which was a third affirmative defense in the original amended answer of these defendants), defendants John A. Miller and Anna Miller Allege:

I.

That defendant Northern Pacific Railway Company is the owner in fee in its own separate right, and has the right and is entitled to the possession, of the portion of land described in the amended complaint of plaintiff herein, constituting its right of way at Palouse, Washington, in, upon and over lots ten (10) and eleven (11) aforesaid of the government survey, the extent and boundaries of which right of way are shown upon the plat hereto attached, marked "Exhibit "A" and made a part hereof.

II.

That defendant Northern Pacific Railway Company is in possession of said premises, which it claims as its right of way, and was in possession thereof at the time of the commencement of this action, but is not in possession of the residue of the premises described in the amended complaint of plaintiff herein and was not in the possession of the premises described in the amended complaint of plaintiff herein other than the said right of way at the time of the commencement of the action herein by plaintiff.

26 For a Third affirmative defense (which was a fourth affirmative defense in the original amended answer of these defendants), defendants John A. Miller and Anna Miller allege:

That defendant Northern Pacific Railway Company is a railway corporation and a common carrier of freight and passengers, and, in connection with its transcontinental line of railroad, has a branch line from Spokane, Washington, to Lewiston, Idaho, which it maintains and operates upon and over said government lots ten and eleven of section one, referred to in the amended complaint of plaintiff, and the extent of its right of way thereon and thereover is shown by said "Exhibit A," which said premises so shown by said exhibit are owned by defendant Northern Pacific Railway Company as a right of way and are being used by it as such right of way and for railroad purposes and are necessary for the use and operation of the said branch railroad of defendant Northern Pacific Railway Company; that said defendant so occupied said premises and so used the same for a right of way and railroad purposes at the time of the commencement of plaintiff's action herein and for a long time prior thereto.

For a fourth affirmative defense (which was a fifth affirmative defense in the original amended answer of these defendants), defendants John A. Miller and Anna Miller allege:

I.

That the Northern Pacific Railway Company is a corporation organized and incorporated under the laws of the state of Wisconsin.

II.

That said Northern Pacific Railway Company is a railway corporation and a common carrier of freight and passengers and owns and operates a transcontinental line of railroad from St.
27 Paul, in the state of Minnesota, to and through the state of Washington, and to the city of Portland, in the state of Oregon; that in connection with said line of transcontinental railroad, it has a branch line from Spokane, Washington, to Lewiston, Idaho, which it maintains and operates upon and over government lots ten and eleven of section one referred to in the amended complaint of plaintiff herein; that the extent of its right of way on, upon and over said premises is as shown by "Exhibit A" hereto attached and made a part hereof.

III.

That the Spokane and Palouse Railway Company, at all the times herein mentioned, was, and still is, a corporation organized and incorporated under the laws of the state of Washington.

IV.

That the Spokane and Palouse Railway Company built said branch line of railroad from Spokane, Washington, to Lewiston, Idaho, and in so doing so expended large sums of money and was at great cost and expense in so doing.

V.

That after the construction of said road between Spokane, Washington, and Lewiston, Idaho, the Spokane and Palouse Railway Company maintained and operated the same from the time of construction thereof until the 21st day of February, 1899, at which time, for a valuable consideration, the Spokane and Palouse Railway company conveyed the said railroad, right of way and all its property to the Northern Pacific Railway Company.

VI.

That ever since said Northern Pacific Railway Company acquired said railroad and right of way and matters and things incident thereto, it has maintained and operated the same.

28

VII.

That ever since the commencement of the operation of said road it has been daily and continuously operated, and freight and passengers have been daily and continuously, since the commencement of the operation of said road, carried upon and over the said road and to and through the town of Palouse, Washington, where the land in controversy in this action is situated.

VIII.

That at the time of the construction of said railroad plaintiff was a resident in or about the said town of Palouse, Washington, and had full knowledge and notice that the said road was being constructed and that large sums of money were being expended and paid out on account of the construction of said railroad and that the said railroad was being built for the purpose of carrying freight and passengers thereon and thereover, and that when constructed it would be the imperative duty of the owner thereof to carry freight and passengers upon and over said road to and from all points, and, necessarily, upon and over the premises in controversy in this action.

IX.

That at the time of the erection or construction of said railroad, plaintiff, with the knowledge and notice aforesaid, did not make any objection to the building or construction of said road, or object to the maintenance or operation thereof, and did not bring any suit or action to prevent the erection or construction of the said railroad upon or over the premises in controversy in this action, but, on the contrary, acquiesced in the erection, construction, completion, maintenance and operation upon and over said premises until after patent issued to the land in controversy upon the date hereinbefore stated.

29

X.

That without any objection on the part of plaintiff there has been constructed upon said right of way on the premises in contro-

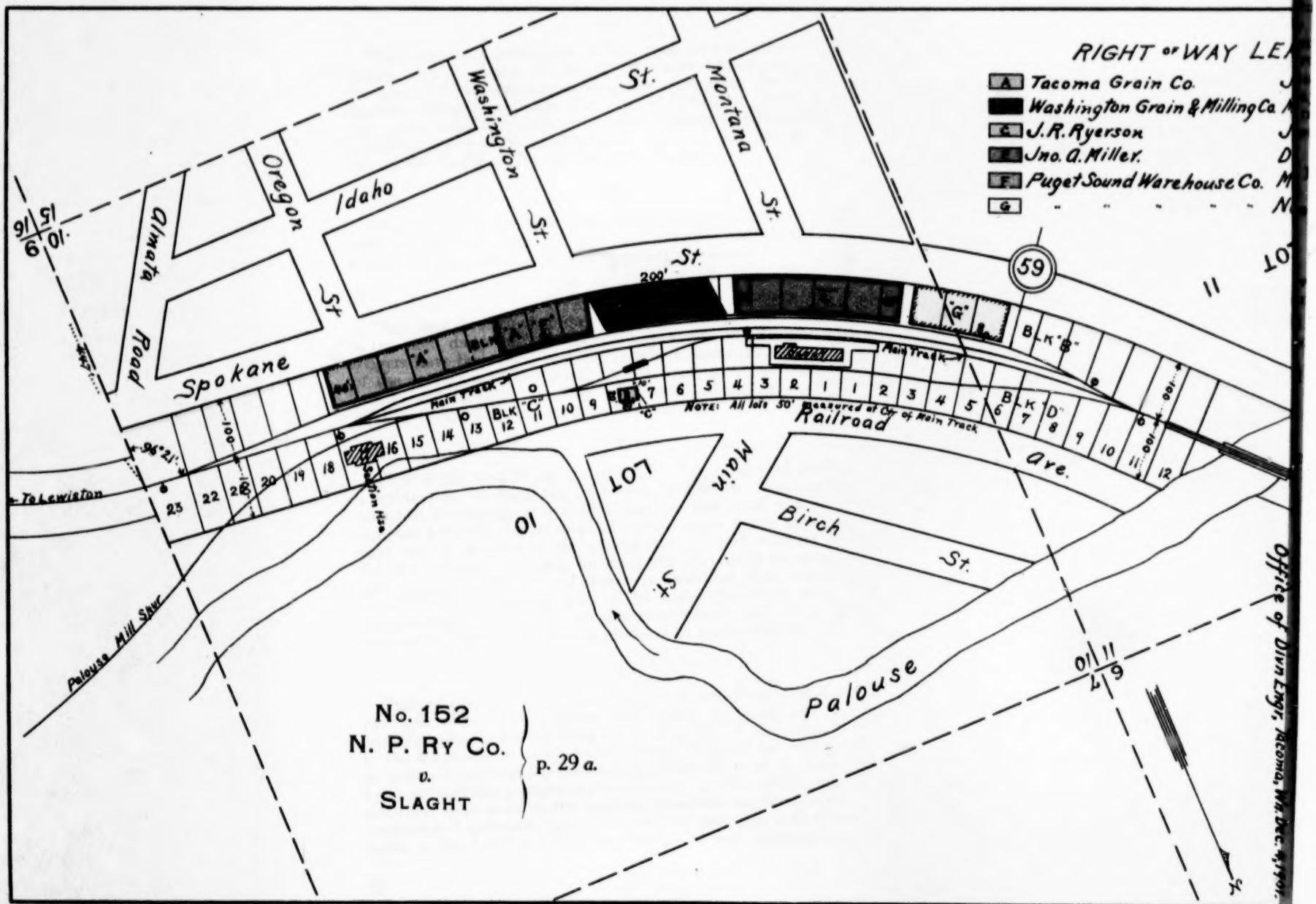

RIGHT OF WAY LE
A Tacoma Grain Co.
Washington Grain & Milling Co.
J.R. Ryerson
Jno. A. Miller.
Puget Sound Warehouse Co.
G
Washington St.
Montana St.
Oregon
Idaho
Cimata Road
Spokane St.
200'
59
Main Track
Railroad
Ave.
Main St.
LOT
Birch St.
Palouse
Palouse Mill Race
To Lewiston
Note: All lots 50' measured at Cy of Main Track
No. 152
N. P. Ry Co.
v.
Slaght
p. 29 a.
Office of Div Engr, Tacoma, Wn. Dec. 4, 1901.

Exhibit "A"

RIGHT OF WAY LEASED

A	Tacoma Grain Co.	June 1st 1899, 5 years.
B	Washington Grain & Milling Co.	May 1st 1896, 8 years.
C	J.R. Ryerson	Jan. 1st 1898, 4 years.
D	Jno. A. Miller.	Dec. 1st 1898, 5 years.
E	Puget Sound Warehouse Co.	May 1st 1900, 5 years.
G	" " " " "	Nov. 1st 1899, 6 years.

N.P.R.
Idaho Div. P & L Br.
Map showing
R. of W. through Gov. Lots 10 & 11.
Sec 1, Twp 16N, Range 45E, W.M.
of Palouse, Wn.
Scale 1"=200'
Office of Div'n Engr, Tacoma, Wn. Dec. 4, 1901.

versy valuable and lasting improvements in the shape of depot, water tanks and warehouses which would be practically of no value should the road and right of way of defendant Northern Pacific Railway Company be changed from the premises in controversy.

Wherefore, defendants pray that plaintiff have and take nothing by his action herein, and that defendant Railway Company be adjudged the owner of said right of way; that plaintiff go hence without day and that these defendants have and recover of and from plaintiff their costs and disbursements herein.

STEPHENS & BUNN,
Attorneys for Defendants,
John A. Miller and Anna Miller.

JAMES B. KERR,
Of Counsel.

Due service of within Second Amended Answer by receipt of a true copy thereof is admitted this 24″ day of January, 1903.

THOMAS NEILL,
Attorneys for Pl'tff.

Endorsed: Filed January 24 1903. W. O. McCaw, Clerk.

(Here follows diagram marked page 29*a*.)

30 In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Stipulation.

It is hereby stipulated that the second amended answers of defendants to the amended complaint of plaintiff herein may be filed without verification, and that the verifications of said second amended answers and of each of them be, and they are hereby, waived.

Dated this January 23, 1903.

THOMAS NEILL,
Attorneys for Plaintiff.

Endorsed: Filed January 28 1903, W. O. McCaw, Clerk.

31 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Motion and Demurrer.

Comes now the plaintiff and moves the Court to strike from the second amended answer of defendant Northern Pacific Railway Company the words "This defendant alleges that said tenants occupy separate and distinct parcels and portions of said right of way," on the second page of said answer, and being the last two lines of the admissions and denials of the allegations of the complaint, on the ground,—

1st. That said words are irrelevant, sham and frivolous.

2nd. That the same words were used in the first amended complaint and made part of said defendant's first affirmative defense to which the Court sustained plaintiff's demurrer.

3rd. Because they are neither an admission or a denial of any matter or thing alleged in the complaint, and are not alleged as a separate or affirmative defense.

Plaintiff demurrers to the first affirmative defense of said defend-

ant contained in his second amended complaint herein, on the grounds that the said affirmative defense does not state facts sufficient to constitute a defense to plaintiff's cause of action.

32 Plaintiff demurrers to the second affirmative defense of said defendant contained in his said second amended answer, on the ground that said defense does not state facts sufficient to constitute a defense to plaintiff's cause of action.

Plaintiff demurrers to the third affirmative defense of the defendant, contained in his said second amended answer, on the ground that said defense does not state facts sufficient to constitute a defense to plaintiff's cause of action.

Plaintiff demurrers to the fourth affirmative defense of said defendant herein contained in his second amended answer on the ground that said defense does not state facts sufficient to constitute a defense to plaintiff's cause of action.

THOMAS NEILL &
W. E. McCROSKEY,
Attorney- for Plaintiff.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 27 day of January 1903. W. O. McCaw, County Clerk.

33 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING COMPANY, a Corporation, Defendants.

Motion and Demurrer.

Comes now the plaintiff and moves the court to strike from the second amended answer of defendant The Washington Grain & Milling Company, the words, "These defendants allege that defendants John A. Miller, The Washington Grain and Milling Company, occupy separate and distinct parcels and portions of the right of way, of defendant Northern Pacific Railway Company upon and over government lots ten (10) and eleven (11) of said section" of page two of said answer, being the last five lines of the admissions and denials of the allegations of the complaint, on the ground,

1st. That said words are irrelevant, sham and frivolous.

2nd. That the same words were used in the first amended complaint and made part of said defendants' first affirmative defense to which the Court sustained plaintiff's demurrer.

3rd. Because they are neither an admission or a denial of any matter or thing alleged in the complaint, and are not alleged as a separate or affirmative defense.

Plaintiff demurrers to the first affirmative defense of said defendant contained in his second amended complaint herein on the

grounds that the said affirmative defense does not state facts
34 sufficient to constitute a defense to plaintiff's cause of action.

Plaintiff demurrers to the second affirmative defense of said defendant contained in his second amended answer, on the ground that said defense does not state facts sufficient to constitute a defense to plaintiff's cause of action.

Plaintiff demurrers to the third affirmative defense of the defendant contained in his said second amended answer on the ground that said defense does not state facts sufficient to constitute a defense to plaintiff's cause of action.

Plaintiff demurrers to the fourth affirmative defense of the defendant herein contained in his said second amended answer on the ground that the same does not state facts sufficient to constitute a defense to plaintiff's cause of action.

THOMAS NEILL,
W. E. McCROSKEY,
Attorneys for Plaintiff.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 27 day of January 1903. W. C. McCaw, County Clerk.

35 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING COMPANY, a Corporation, Defendants.

Motion and Demurrer.

Comes now the plaintiff and moves the court to strike from the second amended answer of defendant- John A. Miller and Anna Miller, his wife, the words, "These defendants allege that defendants John A. Miller, The Washington Grain and Milling Company, occupy separate and distinct parcels and portions of the right of way, of defendant Northern Pacific Railway Company upon and over government lots ten (10) and eleven (11) of said section" on page two of said answer, being the last five lines of the admissions and denials of the allegations of the complaint, on the ground,

1st. That said words are irrelevant, sham and frivolous.

2nd. That the same words were used in the first amended complaint and made part of said defendants' first affirmative defense to which the Court sustained plaintiff's demurrer.

3rd. Because they are neither an admission or a denial of any matter or thing alleged in the complaint, and are not alleged as a separate or affirmative defense.

Plaintiff demurrers to the first affirmative defense of said defendant contained in his second amended complaint herein on the grounds

that the said affirmative defense does not state facts sufficient
36 to constitute a defense to plaintiff's cause of action.

Plaintiff demurrers to the second affirmative defense of said defendant contained in his second amended answer, on the ground that said defense does not state facts sufficient to constitute a defense to plaintiff's cause of action.

Plaintiff demurrers to the third affirmative defense of the defendant, contained in his second amended answer, on the ground that said defense does not state facts sufficient to constitute a defense to plaintiff's cause of action.

Plaintiff demurrers to the fourth affirmative defense of said defendant herein contained in his second amended answer on the ground that said defense does not state facts sufficient to constitute a defense to plaintiff's cause of action.

THOMAS NEILL &
W. E. McCROSKEY,
Attorney- for Plaintiff.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 27 day of January, 1903. W. O. McCaw, County Clerk.

37 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING COMPANY, a Corporation, Defendants.

This matter coming on to be heard this day, on the motion of the plaintiff to the second amended answer of defendant, Northern Pacific Railway Company to strike from said answer the words, "This defendant alleges that said tenants occupies separate and distinct parcels and portions of said right of way," being the words at the end of admissions and denials of the allegations of the plaintiff on page 2, and the Court being fully advised in the premises,

It is ordered that the said words be, and the same are hereby stricken from said second amended answer, but that the defendant need not file an amended answer herein, but the Court will consider said second amended answer the same as if said matter did not appear therein, and as if the words were erased.

To which ruling sustaining said motion the said defendant excepts and his exceptions are by the Court allowed.

And the Court having fully considered the demurrer of the plaintiff to the first, second, third and fourth affirmative defense contained in said defendant's second amended answer,

38 It is ordered that the demurrer to each of said affirmative answers be, and the same is hereby overruled, to which the plaintiff excepts and the exception is by the Court allowed.

It is further ordered that the plaintiff be given ten days in which to reply.

Done in open court this 10th day of February, 1903.

S. J. CHADWICK,
Superior Judge.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 10 day of February 1903. W. O. McCaw, County Clerk.

39 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING COMPANY, a Corporation, Defendants.

This matter coming on to be heard this day, on the motion of the plaintiff to the second amended answer of defendant The Washington Grain & Milling Company to strike from said answer the words, "These defendants allege that the defendants John A. Miller and Anna Miller, his wife, and the Washington Grain and Milling Company, occupies separate and distinct parcels and portions of said right of way of the defendant Northern Pacific Railway Company upon and over said Government lots ten and eleven in said section," being the words at the end of admissions and denials of the allegations of the plaintiff on page 2, and the Court being fully advised in the premises,

It is ordered that the said words be, and the same are hereby stricken from said second amended answer, but that the defendant need not file an amended answer herein, but the Court will consider said second amended answer the same as if said matter did not appear therein, and as if the words were erased.

To which ruling sustaining said motion the said defendant excepts and *his* exceptions are by the Court allowed.

And the Court having fully considered the demurrer of the plaintiff to the first, second, third and fourth affirmative defense
40 contained in said defendant's second amended answer,

It is ordered that the demurrer to each of said affirmative answers be, and the same is hereby overruled, to which the plaintiff excepts and the exception is by the Court allowed.

It is further ordered that the plaintiff be given ten days in which to reply.

Done in open Court this 10 day of February, 1903.

S. J. CHADWICK,
Superior Judge.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 10 day of February 1903. W. O. McCaw, County Clerk.

41 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

This matter coming on to be heard this day, on the motion of the plaintiff to the second amended answer of defendant-, John A. Miller & Anna Miller to strike from said answer the words "These defendants allege that the defendants John A. Miller and the Washington Grain and Milling Company, occupies separate and distinct parcels and portions of said right of way of the defendant Northern Pacific Railway Company, upon and over said government lots ten (10) and eleven (11) in said section," being the words at the end of admissions and denials of the allegations of the plaintiff on page 2, and the Court being fully advised in the premises,

It is ordered that the said words be, and the same are hereby stricken from said second amended answer, but that the defendant need not file an amended answer herein, but the Court will consider said second amended answer the same as if said matter did not appear therein, and as if the words were erased.

To which ruling sustaining said motion the said defendant- excepts and *his* exceptions are by the Court allowed.

42 And the Court having fully considered the demurrer of the plaintiff to the first, second, third and fourth affirmative defense contained in said defendant's second amended answer,

It is ordered that the demurrer to each of said affirmative answers be, and the same is hereby overruled, to which the plaintiff excepts and the exception is by the Court allowed.

It is further ordered that the plaintiff be given ten days in which to reply.

Done in open court this 10th day of February, 1903.

S. J. CHADWICK,
Superior Judge.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 10" day of February, 1903. W. O. McCaw, County Clerk.

43 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

For a reply to the first affirmative defense, of the second amended answer of each of the defendants Northern Pacific Railway Company, John A. Miller and Anna Miller, his wife, and the Washington Grain & Milling Company, the plaintiff admits and denies as follows:—

1st. Admits paragraph I and the whole thereof.

2nd. Denies paragraph II and the whole thereof.

For reply to the second affirmative defense in said answer the plaintiff admits and denies as follows,

1st. Denies paragraph I and the whole thereof.

2nd. Admits paragraph II and the whole thereof.

For reply to the third affirmative defense of said defendant in said second amended answer, the plaintiff admits and denies as follows,

1st. Admits that the defendant Northern Pacific Railway Company is a railway corporation, and common carrier of freights and passengers, and in connection with its transcontinental line of railway has a branch line from Spokane, Washington, to Lewiston, Idaho, which it maintains and operates upon and over said

44 government lots ten and eleven of section one referred to in the amended complaint of plaintiff.

Admits that the said defendant Northern Pacific Railway Company, occupied, at the time of the commencement of plaintiff's action herein, and for a long time prior thereto, occupied as a right of way, the land shown in Exhibit A attached to said answer, but plaintiff denies that the property shown by said Exhibit A, as the property occupied by the said defendant Northern Pacific Railway Company, as a right of way, is owned by the defendant Northern Pacific Railway Company, as a right of way, and denies that the same is necessary for the use and occupation of said branch of railroad of defendant, Northern Pacific Railway Company, or at all.

For reply to the fourth affirmative defense of defendant contained in said second amended answer, plaintiff admits and denies as follows:—

1st. Admits paragraph I thereof.

2nd. Admits that said defendant Northern Pacific Railway Company is a railway corporation, and common carrier of freights and passengers, and owns and operates a transcontinental line of railroad from St. Paul in the State of Minnesota, to and through the State of Washintgon, and to the City of Portland, in the State of

Oregon, and that in connection with said line it has a branch line from Spokane Washington, to Lewiston, Idaho, and that it maintains and operates upon and over said government lots ten and eleven of section one, referred to in the amended complaint of plaintiff herein, and admits that the said defendant, Northern Pacific Railway Company, uses and has used for a long time as a right of way over and across said lots, the property marked and shown in Exhibit A to said answer attached, but denies that
45 the same is a right of way, or that said defendant, Northern Pacific Railway Company, has any right, title, interest or claim, in and to said premises, or any part thereof.

3rd. Admits paragraph III and the whole thereof.
4th. Admits paragraph IV and the whole thereof.
5th. Admits paragraph V and the whole thereof.
6th. Admits paragraph VI and the whole thereof.
7th. Admits paragraph VII and the whole thereof.
8th. Admits paragraph VIII and the whole thereof.
9th. Denies paragraph IX and the whole thereof.
10th. Denies paragraph X and the whole thereof.
11th. Denies paragraph XI and the whole thereof.

For a further and affirmative reply to the second affirmative defense of each of said defendants contained in each of their separate second amended answer herein, plaintiff alleges:—

1st. That long prior to the construction of the Spokane & Palouse Railroad Company, over and across the property described in plaintiff's amended complaint, the plaintiff with Margaret A. Slaght, his then wife, was residing upon said Government lots Ten and Eleven Section One, described in the complaint, claiming the same as a settler, at which time said property, was a part of the unoccupied, unappropriated public domains of the United States.

2nd. That afterwards on the 31st. day of October, 1887, the said Jacob Slaght, in behalf of himself and wife, presented an application to the United States District Land office, for the District in which said land was situated, to enter said Lots Ten and Eleven, together with Lots Fourteen and Fifteen Section One, Township Fifteen North of Range Forty-five, East of the Willamette Meridian, in Whitman County, Washington, under an Act of Congress approved May 16, 1862, entitled "An Act to secure
46 homesteads to actual settlers on public domain," alleging therein that he had established a residence on said land March 4th, 1883, and that said residence had thereafter been continuous, and that he had built a house on said land, and improved the same.

3rd. That upon the making of said application to said land office, the said defendant Northern Pacific Railway Company, was notified of said application of said Jacob Slaght to enter said land, and the said Northern Pacific Railroad Company thereupon filed its objections against the allowance thereof, and thereupon a hearing was ordered by the United States District Land Office, for the District in which said land was situated, for the purpose of determining the rights of the said Northern Pacific Railroad Company and of the said Jacob Slaght, in and to said described land, and thereupon

such proceedings were had, and said District Land officer in July 1899, held that the said land was excepted from the operation of the selection of the Northern Pacific Railroad Company, and that one William L. Powers had the right to make entry thereon, the said William L. Powers having intervened in said contest, and that said defendant Northern Pacific Railway Company had no claim on said land.

4th. That thereafter the said Northern Pacific Railway Company appealed from said decision to the Commissioner of the General Land office, and the said Jacob Slaght also appealed from that part of said decision adverse to him, and on the 13th day of April 1895 the said Commissioner of the General Land office, made and entered his decision in said contest, wherein and whereby the said Commissioner of the General Land Office, held and decided that the said Northern Pacific Railway Company had no right to the land, and also reversed the said decision of the local land office, and held that the said William L. Powers had no rights in said land,
47 and directing the local land office officers to permit the said Jacob Slaght to make homestead entry for said land.

5th. That thereafter the said defendant, Northern Pacific Railway Company, appealed from said decision of the Commissioner of the General Land Office, to the Secretary of the Interior, and that thereafter the said Secretary of the Interior, on the 20th day of May, 1896, affirmed said decision of the Hon. Commissioner of the General Land office as aforesaid.

6th. That thereafter and on to-wit the 20th day of April, 1897, the officers of the Interior Department of the United States, made, executed and delivered to said Jacob Slaght, letters patent, under the great seal of the United States, conveying to the said Jacob Slaght, the said lots Ten, Eleven, Fourteen and Fifteen Section One Township Fifteen, North of Range Forty-five, East of the Willamette Meridian, Whitman County, Washington.

7th. That in August, 1887, and prior to the application of the said Jacob Slaght to make homestead entry upon said land, the said Northern Pacific Railway Company, claiming to be the owners of the said lots Ten and Eleven, sold and conveyed the same by deed of conveyance, containing the usual covenants and warranties, to the said William L. Powers.

8th. That afterwards and on to-wit the 14th, day of September, 1887, the said William L. Powers and his wife, conveyed by a deed of conveyance, to the Spokane & Palouse Railroad Company, a tract of land for a right of way 200 feet wide, over and across said lots Ten and Eleven being the same land shown and marked on defendants Exhibit A, in said answer, as a tract occupied by the defendant the Northern Pacific Railway Company as its right of way.

9th. That thereafter and on to-wit the 12th day of May, 1897, the said Spokane & Palouse Railway Company, and William L.
48 Powers and others, who were the grantees of the said William L. Powers filed in the Superior Court of Whitman County, Washington, their complaint against the said Jacob Slaght, for the purpose of having the said Jacob Slaght declared a trustee and as

holding said land in trust for the plaintiffs and directing a conveyance from him to the real owners, and to enjoin the said Jacob Slaght, from bringing any suit or action to oust or eject the plaintiffs, or any of them, or their grantees, from said land or any part thereof, which complaint was afterwards amended, and said amended complaint, known and designated as the second amended complaint, is in words and figures following to-wit.

"In the Superior Court of the State of Washington for Whitman County.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD DEANE, F. S. BELL, IVAN CHASE, JOHN K. MCCORNACK, ANN J. CLYDE, J. R. MALHERN, SPOKANE & PALOUSE RAILWAY COMPANY, a Corporation; SPOKANE & PALOUSE LAND COMPANY, a Corporation; PALOUSE MILL COMPANY, a Corporation, and A. F. PUGH, Plaintiffs,

vs.

JACOB SLAGHT, Defendant.

Second Amended Complaint.

Plaintiffs for second amended complaint and cause of action against said defendant allege:

I. That the Spokane & Palouse Railway Company is a corporation organized and existing under the laws of the Territory (now state) of Washington.

II. That the Spokane & Palouse Land Company is a corporation, organized and existing under the laws of the State of Washington.

49 III. That the Palouse Mill Company is a corporation, organized and existing under the laws of the state of Washington.

IV. That by the act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast by the Northern Route," and the various acts and joint resolutions of congress supplemental thereto and amendatory thereof, congress granted to the Northern Pacific Railroad Company, lands as follows, to-wit: "Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile, on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the general land office; and whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed

of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

By the sixth section of said act of July 2, 1864, congress further provided as follows, to-wit:

"And be it further enacted, that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general
50 route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be subject to sale, or entry, or pre-emption before or after they are surveyed except by said Company as provided in this act."

V. That the said Northern Pacific Railroad Company signified its acceptance of the terms, conditions and impositions of said act of July 2, 1864, in writing, under the corporate seal of said company, executed pursuant to the direction of its board of directors first had and obtained, and within two years of the passage of said act, to-wit, December 29, 1864, served such acceptance upon the president of the United States.

VI. That having surveyed the general route of that portion of its railroad extending from Minnesota across the then territories of Dakota, Montana and Idaho, and across that portion of the territory of Washington lying east of a point on the Columbia river, near the mouth of the Snake River, it fixed that portion of the general route of its road by causing a map thereof, approved — the secretary of the interior, to be filed in the office of the commissioner of the general land office. That said map of general route was so filed February 21, 1872. That the following described land to-wit: Lots ten, eleven, fourteen and fifteen, in section one, township sixteen north, of range forty-five, east Willamette Meridian, Washington, was situated coterminous with that portion of said general route located in the territory of Washington, and was within forty miles thereof. That March 30, 1872, the commissioner of the general land office transmitted to the register and receiver of the United States District land office at Walla Walla, Washington, that being the district in which the lands in eastern Washington, including the lands hereinbefore described, were situate, a diagram showing said line of general
51 route so fixed with limits embracing the lands coterminous therewith, and within forty miles thereof indicated thereon, and directed the register and receiver of said district land office to withhold from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed odd numbered sections of the public lands within the said limits. That said order of withdrawal and diagram were received at the said district land office April 22, 1872. That the land hereinbefore described was within forty mile limits as designated on said diagram, and was within the terms of said order of withdrawal. That said land was at the date of the grant to said Northern Pacific Railroad Company, at the date when said map of general route of said railroad was filed in the office of the commissioner of the general land office, at the date of said order of

withdrawal, and at the date when said order of withdrawal and diagram were received at the United States district land office at Walla Walla, Washington, public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and it was at all of said times free from pre-emption of other claims or rights; and said land was and is, agricultural land. Plaintiffs further allege, that thereafter the Northern Pacific Railroad Company caused the line of said railroad and telegraph, extending from a point in township seven north, of range thirty-one east Willamette Meridian, Washington, northwesterly to a point in section sixteen, township twenty-five north, of range forty-three east of Willamette Meridian, Washington, to be surveyed and definitely located, and on the 4th day of October A. D. 1880, fixed the definite location of said portion of its railroad and telegraph line by causing a plat thereof, approved by the secretary of the Interior, to be filed in the office of the commissioner of the general land office. That the said land hereinbefore described was located coterminous with
52 and more than forty but within fifty miles of said portion of said railroad and telegraph line thus definitely fixed. That on November 13th, 1880, the commissioner of the general land office transmitted to the register and receiver of the United States district land office at Colfax, Washington territory, that being the district in which the said lands hereinbefore described were then situate, a diagram showing the said line of railroad and telegraph so definitely fixed, with limits indicated thereon, including the lands coterminous with said line, and within forty and fifty miles thereof, the first named of forty mile limit including the lands hereinafter designated as the place limits, and the fifty mile limits, including the lands hereinafter designated as the indemnity limits, and directed the register and receiver of the said district land office to continue the reservation of all lands theretofore withdrawn by the commissioner's order of March 30, 1872, and hereinbefore referred to, and in addition to withhold from sale or entry all the odd numbered sections and parts of sections surveyed and unsurveyed, to the extent of fifty miles from said line and directed that said order should take effect from October 30, 1880. That said order of withdrawal and diagram were received in the said district land office November 30, 1880. That the land hereinbefore described was at the date when the line of the said Northern Pacific Railroad coterminous therewith was definitely fixed, as aforesaid, and at the date of the making of the said order of withdrawal, to-wit, November 13, 1880, and at the date when said order and diagram were received at the United States district land office at Colfax, to-wit, November 30, 1880 public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated except by virtue of the said withdrawal for the benefit of the said Northern Pacific Railroad Company, as herein set forth; and it was at all of
53 said times free from pre-emption or other claims or rights, except for the claims and rights of the said railroad Company. That thereafter said Northern Pacific Railroad Company proceeded with the construction of that portion of its said railroad and telegraph line, extending on, over and along said line of definite loca-

tion, so fixed as aforesaid, and completed the same prior to November 1881. That thereupon the president of the United States appointed three commissioners to examine said portion of said railroad and telegraph line; and that the said commissioners, having carefully examined the same, on the 4th day of November 1881, reported that the said portion of the said railroad and telegraph line had been constructed and completed as required by the said act of congress approved July 2, 1864; and the said report was duly approved and said railroad and telegraph line accepted by the president of the United States on the 26th day of November, 1881.

VIII. Plaintiffs further aver, that prior to the year 1888, the said Northern Pacific Railroad Company definitely fixed the line of its railroad extending from a point on Lake Superior to a point at or near the town of Wallula, in the territory (now state) of Washington, and extending from a point in the city of Portland, Oregon, to a point near the City of Tacoma in the territory (now state) of Washington, and definitely fixed the line of the branch of said railroad extending from a point at or near the town of Pasco in the territory (now state) of Washington, to the said city of Tacoma, on Puget's Sound, and prior to said year, constructed and caused to be constructed, and put in operation a continuous line of railroad and telegraph extending on, over and along the line of definite location of said railroad fixed as aforesaid. That, as fast as portions of said railroad and telegraph line, equal to or exceeding twenty-five miles in length, were so constructed as aforesaid,
54 they were examined by commissioners appointed by the president of the United States, and by said commissioners were found and reported to have been constructed in a good substantial and workmanlike manner, in all respects as required by said act of congress. That such reports were accepted and approved by the president of the United States as provided by said act of congress approved July 2, 1864. That at the date of fixing the definite location of said railroad and telegraph line, certain odd numbered sections and parts of odd numbered sections situate opposite to and within the distance of forty miles of said line of said definite location in the territories, and within twenty miles of said line in the states, had been reserved, sold, granted, or otherwise appropriated by the United States and pre-emption or other claims or rights had attached thereto. That the area of the lands which were within the place limits (forty miles in the territories and twenty miles in the states) of said grant and included in odd numbered sections, which were thus reserved, sold, granted, and otherwise appropriated and to which pre-emption and other rights and claims had attached, and which were mineral lands,—being the lands in lieu of which said Northern Pacific Railroad Company had a right to select indemnity—amounted to 10,624,746.27 acres. That the area of lands within the first indemnity limits of the said Northern Pacific grant, to-wit, coterminous with said line and within the forty and fifty mile limits in the territories, and the twenty and thirty mile limits in the states, which were at the dates of the definite locations of the line of said railroad coterminous therewith, not mineral, public lands, in-

cluded in odd numbered sections and subject to selection by said railroad company, did not exceed 7,177,769.71 acres, and there was not then, nor has there been at any time since sufficient lands within the limits designated in the act of congress approved July 2, 1864, subject to the grant to the Northern Pacific Railroad Company
55 to give to said Company the quantity of lands granted to it by the said act of congres approved July 2, 1864.

IX. That on or about December 15, 1883, the said Northern Pacific Railroad Company applied at the United States District Land office in the district in which said lands were situate, to select, and selected, the said lots ten, eleven, fourteen and fifteen, in section one township sixteen north of range 45 east W. M. Washington, with other lands as indemnity, as lieu of lands within the place limits of the grant to said company, and which had been reserved, sold, granted, or otherwise appropriated, or to which pre-emption or other claims or rights were attached at the date when the line of said Northern Pacific Railroad coterminous therewith was definitely fixed by filing a plat thereof in the office of the commissioner of the general land office, being lands in lieu of — the said railroad Company was authorized to take other lands by the terms and provisions of the said act of congress approved July 2, 1864. That said lands were so selected by the Northern Pacific Railroad Company by filing a list thereof, prepared in the manner and form prescribed in the rules and regulations of the interior department, in the United States District land office, and tendering and paying to the receiver of the said United States District land office all fees which the said company was by law and by rule- and regulations of the interior department required to pay to said receiver upon the selection of lands. That said list was accepted, allowed and approved by the register and receiver of the said district land office on December 17, 1883, and the said fees so tendered to said register and receiver, accepted, and thereafter the said list was transmitted to the office of the commissioner of the general land office for approval. That, at the date of the filing said list, and of the acceptance, allow-
56 ance and approval of said selection by the said United States district land officers as aforesaid, the said land hereinbefore described was public land, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and was free from pre-emption, or other claims or rights, except such reservation, appropriation, claim and rights as had attached thereto in favor of the said Northern Pacific Railroad Company, as hereinbefore set forth. That thereafter, to-wit, October 26, 1887, the said Northern Pacific Railroad Company, in compliance with other and additional instructions, of the said officers of the interior department, of the United States, filed a certain list, designating the losses in lieu of which the said lands described in said selection list filed December 17, 1883, as aforesaid, were selected; which said other and additional instructions were issued and given after said selection had been accepted, allowed and approved as aforesaid. That thereafter to-wit in the year 1892 and 1893, the said Northern Pacific Railroad Company, in compliance with other and additional instructions, issued

by the officers of the interior department of the United States, subsequent to the acceptance, allowance and approval of said selection, made as aforesaid, rearranged said list of losses and said selection list so that the loss for which each tract of land selected by said company, had been taken should be specifically designated. That, as appears from said rearranged list, the said lands hereinbefore described were selected in lieu of certain lands included in section seven, township nine north range fifteen east W. M. Washington, which said last described land was located coterminous with and within forty miles of the line of the said Northern Pacific Railroad as definitely fixed, and was, at the date of the grant to the said Northern Pacific Railroad Company, and at the date when the line of said Northern Pacific Railroad, coterminous therewith, was definitely fixed as aforesaid, included in a reservation of lands set apart for the Yakima Indians.

57 X. That after the selection of said land by the Northern Pacific Railroad Company, to-wit, on or about December 24, 1885, the said Northern Pacific Railroad Company entered into a contract in writing with the plaintiff William L. Powers to convey lots 3, 6, 11 and 14 in said section one, township sixteen north of range forty-five east, upon the payment by said Powers to the said railroad Company of the sum of $822.00. That thereafter the said Powers having paid to the said railroad company the said sum, the said railroad company, on or about August 4, 1887, made, executed and delivered to the said Powers its certain instrument in writing, conveying to the said Powers the said lots last hereinbefore described, and all thereof. That on or about July 30, 1887, the said Northern Pacific Railroad Company, made, executed and delivered its certain instrument, in writing to the said plaintiff William L. Powers, wherein and whereby it conveyed to the said plaintiff lots 2, 7, 10 and 15 in said section one, township sixteen north of range 45 east W. M., Washington, said lands so settled upon aggregating in area — acres. That shortly thereafter the said Dufield sold and assigned his possessory rights and improvements to one L. M. Rhodes. And thereafter, he the said Rhodes, having failed to pay for said possessory right and improvements, the said right and improvements were assigned to the plaintiff William L. Powers, who settled thereon in 1881, with the expectation and intention of purchasing said lands, or a portion thereof, from the said railroad company. That soon after such settlement the said Powers offered to purchase lots 2, 7, 10, and 15 from the said railroad company, and at the same time one John G. Powers, a brother of said plaintiff William L. Powers, offered to purchase lots 3, 6, 11 and 14 from said Company. That thereafter

58 the said plaintiff William L. Powers, purchased the said lands from the said railroad company, as hereinbefore set forth, having prior to said purchase taken a relinquishment from the said John G. Powers of all interest in and to lots 2, 7, 10, and 15. That defendant Slaght, on or about March 1st, 1883 rented and leased said lot ten of and from said William L. Powers and under and in pursuance of such renting and leasing from said

Powers said Slaght was to and did receive and take possession of said lot ten on or about said date; that plaintiffs allege that in and by said contract said Slaght agreed to and did pay rental to said Powers for the use and occupation of said premises from the date said Slaght received and took possession thereof until on or about the 31st. day of October, 1887. That on October 31, 1887, the said defendant Slaght presented an application at the United States District land office for the district in which said land was situate to enter the said described lots 10, 11, 14 and 15 in section 1, township 16 north, of range 45 east, W. M. Washington, as public lands of the United States, under the act of congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain." That in the said application the said Slaght alleged that he had settled and established his actual residence upon the said lands March 4th, 1883, and that such residence had been therafter continuous, and that he had built a house on said lands and improved the same. But plaintiffs aver that said settlement, occupation and improvement by Slaght were under and in pursuance of said renting and leasing of and from said Powers as hereinbefore set forth, and not otherwise. Plaintiffs further aver that the Northern Pacific Railroad Company, having been notified of the application of said Jacob Slaght to enter said land, filed its objection against the allowance thereof, on or about December 2, 1887. That thereupon a hearing was ordered by the United States district land officers for the district in which said land was situate for the purpose of determining the rights of the said rail-
59 road company and the said Jacob Slaght in and to the said described land. That thereupon such proceedings were had in said contest that said United States district land officers, on or about the — day of July, 1889, held that the said land was excepted from the operation of the selection of the said Northern Pacific Railroad Company, by reason of the settlement of this plaintiff William L. Powers, and that the said defendant Slaght had settled upon said land as a tenant of said Powers. That thereafter the said Northern Pacific Railroad Company appealed from said decision to the commissioner of the general land office, and such further proceedings were taken and had in said contest that on the 13th day of April, 1895, the said commissioner of the general land office made and rendered his certain decision in said contest, in the words and figures following, to-wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 13, 1895.

"JACOB SLAGHT
vs.
NOR. PAC. R. R. CO.

Involving Homestead Application for Lots 10, 11, 14, 15, Sec. 1, 16 N., 45 E.

Register & Receiver, Walla Walla, Washington.

SIRS: I have considered the contest of Jacob Slaght *vs.* Northern Pacific Railroad Company and William L. Powers, intervenor, involving lots 10, 11, 14, 15, Sec. 1, T. 16, N. R. 45 East, the record in which was transmitted with your letter of July 10, 1889, on appeal by Jacob Slaght, and said railroad company from your decision in favor of William L. Powers, intervenor.

The land is in the limits of the withdrawal upon the line of the amended general route of said road, the map showing
60 which was filed Feb. 21, 1872, and upon the definite location of the road it fell within the indemnity limits the order for the withdrawal of which was received at the local office November 30, 1880.

These withdrawals have been held by the Department to be without authority of law and of no effect (17 L. D. 8 and 18 L. D. 87).

On December 17, 1883, the company selected the land in question under act of July 2, 1864 (13 Stat. 356) per list No. 1, and on the same day said company selected the land under acts of July 2, 1864 (13 Stat. 356) and May 31, 1870 (16 Stat. 376) for indemnity purposes per amendatory list No. 2.

On October 31, 1887, Jacob Slaght presented an application to make homestead — for this land and alleged that he settled and established his actual residence thereon March 4, 1883, and the same has been continuous; that he built a house 12 x 14 feet, a kitchen 10 x 12 feet, a stable, dug a cellar and broke a garden spot and built a half mile of fence and that his improvements are worth about $275.00.

The company was duly notified of said application and filed its objections against the acceptance of the same Dec. 2, 1887.

Upon the issuance of notice to the parties in interest a hearing in the case was held and concluded April 4, 1889, at which all parties were represented.

The testimony adduced at the hearing on behalf of Slaght shows that he established his actual residence on the land in March 1883, that he broke and planted a garden, that, within a few days after moving in the log house on the land he built an addition thereto, that in September 1883 he built a house 12 x 14 feet, a kitchen, a stable, a chicken house, dug a cellar and fenced about 80 acres; that his residence on the above described tracts of land, has been

continuous since March 1, 1883, and that his improvements are worth about $400.00, and that he is a qualified settler.

61 The testimony adduced at the hearing on behalf of the defendants is to the effect that William L. Powers has resided in Palouse City, Whitman Co. Washington, and on Sec. 1, T. 16 N. R. 45 E. for thirteen years; that prior to Slaght's residence on the land in question, a part of it was claimed by John D. Powers, a brother of the intervenor; that Slaght went into possession of the land by renting it from said William L. Powers; that Slaght established himself on the land in 1883, and is still residing thereon; that a portion of this land has been platted as an addition to the Town of Palouse City, previous to which Slaght had lived on the land for two years; that Slaght's residence is on lot 10, and when he first settled upon the place he paid a small rental to William L. Powers, that the intervenor has resided upon lot 7, sec. 1 T. 16 N. R. 45 E. since 1881, that he intended to get title to the land involved in this case from the Northern Pacific Railroad Company under its grant of July 2, 1864 (*supra*). That William L. Powers has exhausted all his rights under the public land laws except his timber culture right; that in 1877, A. M. Duffield settled upon and laid claim to lots 2, 3, 6, 7, 10, 11, 14, 15 sec. 1, T. 16, N. R. 45 E. who shortly thereafter sold his possessory right and improvements to L. M. Rhodes, taking his (Rhodes) notes for $650, who could not meet the notes and accordingly he relinquished his rights to William L. Powers, who offered to purchase lots 2, 7, 10 and 15, from said railroad company, and at the same time John G. Powers, a brother of William L. Powers, offered to purchase lots 3, 6, 11, and 14 from said company; that William L. Powers built a log cabin on lot 10 in 1879, plowed and planted about six acres to grain and continued to cultivate it; that in 1885 he cleared lot 10, and a part of lot 11, and raised two crops thereon; that in the spring of 1881 he built a house on lot 7, and moved into it in June

62 1881, and has made it his home ever since; that on September 1, 1879, said railroad company mortgaged lots 2, 7, 10, 15, 3, 6, 11 and 14 sec. 1, T. 16 N. R. 45 E. to the Farmers Loan & Trust Company of New York City on July 13 1887. Lots 2, 7, 10, and 15 were bargained sold and deeded to William L. Powers and on August 4, 1887, lots 3, 6, 11 and 14 were bargained sold and deeded to William L. Powers, and in the settlement William L. Powers took a relinquishment from John G. Powers of all his rights to lots 2, 7, 10 and 15, he (William L. Powers), paid said railroad company $1249.28 for said eight lots.

You hold that the land in question is excepted from the operation of the Company's selection by reason of the settlement of the said William L. Powers and that the same should be held as public land and subject to his right to purchase under section 5 of the act of March 3, 1887 (24 Stat. 556) or act of January 13, 1881 (21 Stat, 315) and that Slaght settled on the land as the tenant of Powers.

The basis of your decision is not well founded.

1st. For the reason that Powers did not apply to purchase the land prior to the passage of the act of March 3, 1887 (*supra*).

2nd. Because no act to purchase under said act of January 13, 1881 (*supra*) has been made within the prescribed time; that he was not qualified to purchase under said act; not having exhausted his timber culture right, and besides such application to purchase shall not cover more than 160 acres, and, again, it appears as an after thought, to secure title to this land under the latter named act, as the same was purchased from the railroad company in 1887 under the grant of July 2, 1864 (*supra*).

Therefore in view of this showing, your decision in favor of William L. Powers is hereby reversed likewise your decision adverse to Jacob Slaght.

63 Your opinion that said Company's selection as to this land was improperly allowed and that the company had no right to the land prior to its selection and as the same was occupied and improved as the home of a settler, Slaght's, at the date of selection, that such selection as to the land in question should be canceled, in accordance with the uniform practice of the Department, and I concur therein.

Accordingly, amendatory list No. 2 of selection of Dec. 17, 1883, by said company is hereby held for cancellation as to said lots 10, 11, 14 and 15 sec. 1, Twp. 16 N. R. 45, E.

The usual time, sixty days, after notice, will be allowed the railroad company and William L. Powers, within which to appeal to the Honorable Secretary of the Interior.

Should this decision become final, Slaght will be permitted to make homestead entry for this land; you will advise him of this action.

At the proper time you will make due report as to the action taken in the premises.

Messrs. Britton & Gray, the resident attorneys of said railroad company will be advised hereof by this office,

Yours respectfully,

(Signed) S. W. LAMOREUX,
Commissioner."

That thereafter the said Northern Pacific Railroad Company appealed from decision of the commissioner of the general land office to the secretary of the interior. That the said secretary of the interior, on or about the — day of —— 1896 affirmed the said decisions of the commissioner of the general land office, and thereafter to-wit, on the — day of ——, 1897, the officers of the interior department made, executed and delivered to the said defendant,

64 Jacon Slaght, letters patent under the great seal of the United States, purporting to convey to the said defendant Jacob Slaght, the said lots 10, 11, 14 and 15 in section 1, township 16, North of Range 45 East W. M. Washington. But plaintiffs further aver that said letters patent were issued under a misconstruction and misinterpretation of the law; that long prior to the settlement upon said land by the said Jacob Slaght, the said lands, and each and all

thereof, had been reserved for the use and benefit of the said Northern Pacific Railroad Company, as hereinbefore set forth. That the plaintiff William L. Powers settled upon said lands with the intention of purchasing the same from the said Northern Pacific Railroad company. That, by reason of the premises, the said land was subject to selection by said Northern Pacific Railroad Company, at the time the same was selected by said company, as hereinbefore set forth, and that thereby the said Northern Pacific Railroad Company acquired the title in and to said described lands, and at the time the said defendant, Jacob Slaght, applied to enter said land, and at the date of the said hearings in said contest hereinbefore set forth, and at the date of the issuance of said letters patent, as aforesaid, the said land was not, nor was it at any of said times, public land subject to settlement or entry under the land laws of the United States other than the said act of congress approved July 2, 1864, granting land to the said Northern Pacific Railroad Company, and that the said officers of the interior department of the United States were without authority to issue said letters patent purporting to convey the said land to the said defendant, Jacob Slaght, because the said United States had long prior to the issuance of said letters patent parted with the title to the said described lands, and each and all thereof, to the said Northern Pacific Railroad Company. Plaintiffs further aver that in the rendition of the said decision by the commissioner of
65 the general land office, and by the secretary of the interior, as hereinbefore set forth, the said officers of the Interior department misconceived and misconstrued the law, and the same, or any part thereof, is not the law.

XI. Plaintiffs further aver that the said plaintiffs Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, J. R. Malhern, John K. McCornack, Ann J. Clyde, Spokane & Palouse Railway Company, Spokane & Palouse Land Company, Palouse Mill Company, and A. F. Pugh, assert and claim title to certain portions of the said lands hereinbefore described under and by virtue of certain instruments in writing duly made, executed and delivered to them by the said plaintiff, William L. Powers, and his grantees, conveying to them, the plaintiffs last above named, certain lots and parcels of the said land hereinbefore described.

XII. Plaintiffs further aver that the said plaintiff William L. Powers has heretofore, and by his certain instruments in writing, duly made, executed and delivered, conveyed certain other portions of said described land to various parties, and has in said instruments of writing covenanted and agreed to and with the said grantees therein named, that he would warrant and defend the title so conveyed to the said grantees.

XIII. That the questions involved and to be determined in this action are of common and general interest to many persons, and the parties interested herein are so numerous that it is impracticable to bring them before the court.

XIV. That plaintiffs and said numerous other persons are the owners in fee simple, and have an indefeasible title, and are in possession of the following described premises, in the County of

Whitman, in the State of Washington, to-wit: Lots 10, 11,
66 14 and 15 Section 1 in Township 16 North, of Range 45 East of the Willamette Meridian, and that said defendant claims an interest or estate therein adverse to the said plaintiffs, which said claim of defendant is without any right whatever, and said defendant has not any estate, right, title or interest whatever in said land or premises, or any part thereof.

XV. That defendant is threateing to commence divers and sundry suits in ejectment, and without suit forcibly to dispossess and eject plaintiffs and said numerous other parties of and from said premises, or a portion thereof, and unless enjoined and restrained by an order of this honorable Court, will so bring said suits, and will also without suit forcibly enter said premises, and with force, and without any right whatever, eject and dispossess plaintiffs and said numerous other parties; that thereby a multiplicity of suits will be caused, and great costs and injuries inflicted upon these plaintiffs and said divers and numerous other parties having a common and general interest with plaintiffs in and to the said premises, or some part thereof, and that thereby the courts of this state will be greatly and unnecessarily burdened, and great and irreparable injury will be wrought to these plaintiffs and said numerous other parties having common and general interest in the questions involved herein.

Wherefore, Plaintiffs pray,

1. That said defendant may be enjoined and restrained from selling or attempting to sell, the lands hereinbefore described, or any part thereof, and from bringing separate or independent suits against these plaintiffs, or against any other person or persons interested in the questions or the premises and property hereinbefore described, or any part thereof, and from seeking to eject or
67 dispossess with or without suit, said plaintiffs or said other persons, or any or either of them, from said lands, or from any part thereof.

2. That a preliminary restraining order and injunction may be issued enjoining and restraining the said defendant, as aforesaid, until the final determination of this suit.

3. That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by a decree of this Court.

4. That by said decree it be declared and adjudged that the defendant has no estate, right, title or interest, whatever, in or to said land and premises, or any part thereof, and that the titles of plaintiffs and said numerous other persons and parties having a common and general interest in and to said premises, or a portion thereof, be decreed good, valid, indefeasible fee simple, and free from all claims of said defendant.

5. That defendant be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to plaintiffs and said other parties, and the alleged claims of defendant be cancelled, for naught held, and be decreed null and void, and defendant be required to surrender the same, and be required to convey said alleged claims to plaintiffs and said other persons.

6. That the said letters patent issued to the said Jacob Slaght as

aforesaid, may be declared to have been issued under a misconstruction of the law and to be void and to constitute clouds upon the titles of these plaintiffs and of the various persons to whom the said plaintiff William L. Powers has conveyed any portion of the said land as aforesaid.

7. That the said defendant Jacob Slaght, may be decreed to be a trustee, holding such right, title and interest in and to said lands as he may have acquired under and by virtue of said letters
68 patent, as aforesaid, if any, for the benefit of the said plaintiff William L. Powers and his grantees, both direct, and through *means* conveyances and that the said defendant Jacob Slaght, may be required to convey such right, title and interest if any, to the said plaintiff William L. Powers, and his grantees as aforesaid.

8. For such other and further relief in the premises as shall to the Court seem meet, proper and agreeable to equity.

9. That plaintiffs may have judgment for their costs and disbursements in this action.

STOLL, STEPHENS, BUNN & MACDONALD,
Attorneys for Plaintiffs.

STATE OF WASHINGTON, *County of Spokane, ss:*

F. D. Gibbs, being first duly sworn, upon oath deposes and says: That he is an officer of the said plaintiff Spokane & Palouse Railway Company, to-wit, its general agent, located at the City of Spokane, Washington; that said corporation, Spokane & Palouse Railway Company, is one of the plaintiffs in the above entitled action, and affiant makes this affidavit for and on behalf of said plaintiff; that affiant has heard read the foregoing second amended complaint and knows the contents thereof; and that the same is true as he verily believes.

F. D. GIBBS.

Subscribed and sworn to before me this 19th day of February, 1898.

E. T. WHITE,
Notary Public in and for the State of Washington,
[SEAL.] *Residing at Spokane, Washington."*

69 10th. That to said amended complaint the defendant demurred on the ground that said amended complaint does not state facts sufficient to constitute a cause of action against the defendant.

11th. That thereafter the said superior court made and entered its ruling on said demurrer, which was, in words and figures, following, omitting the title, to-wit:

"The demurrer of the defendant, to the second amended complaint of plaintiff herein, came on regularly for hearing and determination on the 13th day of June 1898 and plaintiffs and defendants appearing bu their respective counsel, and after argument

and the Court having been fully advised in the premises, it was ordered that the said demurrer be, and the same is, hereby sustained.

Whereupon plaintiffs announced that they desire to stand upon their second amended complaint, and decline to further plead. Thereupon defendant moved the Court for an order dismissing the action of plaintiffs herein, which motion was granted by the Court. Plaintiffs excepted to the order and ruling of the Court sustaining said demurrer also to the ruling and order of the Court sustaining a motion of defendant to dismiss the above entitled action, which objections were, and they are hereby allowed by the court.

Wherefore, it is ordered and adjudged by the court that the above entitled action be, and the same is, hereby dismissed at plaintiffs' costs, and that defendant do have and recover of and from plaintiffs his costs and disburesements herein taxed at seventeen dollars.

Done in open court this 15th day of June, 1898.

WILLIAM McDONALD, *Judge.*"

12th. That thereafter and on to-wit the 24th day of June, 1898, the plaintiffs in said action, appealed from said order and final judgment sustaining the demurrer of the defendant to plain-
70 tiffs' second amended complaint, and dismissing the action of plaintiffs herein and for costs, to the Supreme Court of the State of Washington.

13th. That thereafter and on to-wit the 14th day of January 1899, the said Supreme Court of the state of Washington, made and entered its judgment in said court, which omitting the title, is in words and figures following to-wit:

"This cause having been heretofore submitted to the Court upon the transcript of the record of the Superior Court of Whitman County and upon the argument of counsel, and the Court having duly considered the same and being fully advised in the premises and having filed and submitted its opinion in writing, now on this 14th day of January 1899 on motion of Wyman & Neill, of counsel for respondent, considered, adjudged and decreed that the judgment of said Superior Court be, and the same is hereby affirmed with costs, and that the said Jacob Slaght have and recover off and from said William L. Powers *et al.* and from F. H. Mason surety the costs of this action taxed and allowed at $88.75 and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceeding, in accordance with the opinion herein filed."

and thereupon the Clerk of said Supreme Court transmitted a certified copy of said judgment to the Clerk of the Superior Court and was by him filed therein on January 20, 1899.

14th. That thereafter the said plaintiffs took said case to the Supreme Court of the United States on a writ of error, and the said Supreme Court having considered the same, did on the 23rd day of February in the year of our Lord 1901, affirm the said judgment of the Supreme Court of the State of Washington, as aforesaid.

15th. That on to-wit, and prior to and about and during the year

of 1887, the said Spokane & Palouse Railway Company con-
71 structed its line of railroad from Spokane, Washington, to Genesee, Idaho, and operated said line of railway, for the carriage of freights and passengers, and until the 21st day of February, 1899.

16th. That on said 21st day of February, 1899, the said Spokane & Palouse Railway Company transferred and conveyed to the defendant, the Northern Pacific Railway Company, all its property and all its right, title and interest in and to its railroad bed, rails, and equipments, and all its right, title and interest in and to the right of way, for said railway.

17th. That on said 21st day of February, 1899, the said Spokane & Palouse Railway Company had no right, title, interest or estate in or to any portion of said right of way, nor did they at any time prior thereto, or since have or acquire any right, title or interest therein, by deed, contract, or conveyance of any kind, *or interest therein, by deed, contract, or conveyance of any kind,* or by proceedings for condemnation thereof or in any other manner or at all.

18th. That the said Spokane & Palouse Railway Company was on said day, and prior thereto in possession of and occupying said right of way for railroad purposes, under and by virtue of said deed from William L. Powers to it, as aforesaid, and not otherwise, and without the consent of this plaintiff, and against the will and protest of this plaintiff, and the said defendant Northern Pacific Railway Company, as grantee and assignee of the said Spokane & Palouse Railway Company has been occupying said right of way, and using the same for railroad purposes against the will and wish and protest of this plaintiff, and without his consent.

19th. That said defendant Northern Pacific Railway Company has not acquired by deed, contract or conveyance of any kind or by condemnation proceedings of any kind, nor has the said de-
72 fendant at any time commenced condemnation proceedings to acquire the title to, or the right to any portion of said right of way, or to acquire the title or the right of way over and across any parcel of said lots ten and eleven as aforesaid.

20th. That said Spokane & Palouse Railway Company constructed, built and erected its railroad and structures on said land, without the consent of and against the protest and objections them made by plaintiff, to it before said railroad was constructed, and during the time it was being constructed, and all times, and that said Spokane & Palouse Railway Company erected and constructed said railroad and the structures appertaining thereto in violation of the rights of this plaintiff, and well knowing the claim of the plaintiff to the ownership of all of said lots ten and eleven as aforesaid.

21st. That the judgment in the action aforesaid was and is an adjudication of all the rights that the said Spokane & Palouse Railway Company had or claimed to have, or which at this time it might have claimed in or to any part or parcel of said lots ten and eleven or any right that they might have had to use or occupy any portion thereof as a railroad and right of way, and said defendant as assignee and grantee of the said Spokane & Palouse Railway Company

is estopped from asserting any right, title, interest, claim, or right to the possession of any part or portion of said lots ten and eleven aforesaid.

For further and affirmative reply to the third and fourth affirmative defense of each of said defendants contained in each of their separate second amended answer- herein, plaintiff alleges:

1st. That long prior to the construction of the Spokane & Palouse Railway Company, over and across the property described in plaintiff's amended complaint, the plaintiff with Margaret A. Slaght, his then wife, was residing upon said Government lots Ten and Eleven, Section one, described in the complaint, claiming the
73 same as a settler, at which time said property was a part of the unoccupied unappropriated public domains of the United States.

2nd. That afterwards on the 31st day of October, 1887, the said Jacob Slaght, in behalf of himself and wife, presented an application to the United States District land office, for the district in which said land was situated, to enter said lots ten and eleven, together with lots fourteen and fifteen, section one, township sixteen North of Range forty-five, East of the Willamette Meridian, in Whitman County, Washington, under an act of Congress approved May 16, 1862, entitled, "An act to secure homestead to actual settlers on public domain" alleging therein that he had established a residence on said land March 4, 1883, and that said residence had thereafter been continuous and that he had built a house on said land and improved the same.

3rd. That upon the making of said application to said land office, the said defendant Northern Pacific Railway Company, was notified of said application of said Jacob Slaght, to enter said land, and the *and the* said Northern Pacific Railway Company thereupon filed its objections against the allowance thereof, and thereupon a hearing was ordered by the United States District land office, for the district in which said land was situated, for the purpose of determining the right of the said Northern Pacific Railway Company and of the said Jacob Slaght, in and to said described land, and thereupon such proceedings were had, and said District land officer in July 1899 held that the said land was excepted from the operation of the selection of the Northern Pacific Railway Company, and that one William L. Powers had the right to make entry thereof, the said William L. Powers having intervened in said contest, and that said defendant Northern Pacific Railway Company had no claim on said land.

4th. That thereafter the said Northern Pacific Railway
74 Company appealed from said decision to the Commissioner of the General Land Office, and the said Jacob Slaght also appealed from that part of said decision adverse to him, and on the 13th day of April 1895 the said Commissioner of the General Land Office made and entered his decision in said contest, wherein and whereby the said Commissioner of the General Land Office held and decided that the said Northern Pacific Railway Company had no right to the land, and also reversed the decision of the local land office, and held that the said William L. Powers had no rights in said

land, and directing the local land office officers to permit the said Jacob Slaght to make homestead entry for said land.

5th. That thereafter the said defendant, Northern Pacific Railway Company, appealed from said decision of the Commissioner of the General Land Office, to the Secretary of the Interior, and that thereafter the said secretary of the Interior, on the 20th day of May, 1896, affirmed said decision of the Hon. Commissioner of the General Land Office as aforesaid.

6th. That thereafter and on to-wit the 20th day of April 1897, the officers of the interior department of the United States made, executed and delivered to said Jacob Slaght, letters patent, under the great seal of the United States conveying to the said Jacob Slaght the said lots ten, eleven, fourteen and fifteen section 1, Township 15 North of Range 45, East of the Willamette Meridian, Whitman County, Washington.

7th. That in August 1887 and prior to the application of the said Jacob Slaght to make homestead entry upon said land, the said Northern Pacific Railway Company claiming to be the owners of the said lots 10 and 11 sold and conveyed the same by deed of conveyance, containing the usual covenants and warranties, to the said William L. Powers.

75 8th. That thereafter on to-wit the 14th day of September, 1887, the said William L. Powers and his wife conveyed by a deed of conveyance, to the Spokane & Palouse Railway Company, a tract of land for a right of way 200 feet wide over and across said lots 10 and 11 being the same land shown and marked on defendants Exhibit A, in said answer, as a tract occupied by the defendant the Northern Pacific Railway Company as its right of way.

9th. That thereafter and on to-wit the 12th day of May, 1897 the said Spokane & Palouse Railway Company, and William L. Powers and *and* others who were the grantees of the said William L. Powers filed in the Superior Court of Whitman County, Washington, their complaint against the said Jacob Slaght, for the purpose of having the said Jacob Slaght declared a trustee, and as holding said land in trust, for the plaintiffs and directing a conveyance from him to the real owners, and to enjoin the said Jacob Slaght, from bringing any suit or action to oust or eject the plaintiffs, or any of them, or their grantees, from said land or any part thereof, which complaint was afterwards amended, and said amended complaint, known and designated as the second amended complaint is in words and figures following, to-wit:

"In the Superior Court of the State of Washington for Whitman County.

WILLIAM L. POWERS, HATTIE DEAN, EDWARD DEANE, F. S. BELL, IVAN CHASE, JOHN K. MCCORNACK, ANN J. CLYDE, J. R. MALHERN, SPOKANE & PALOUSE RAILWAY COMPANY, a Corporation; SPOKANE & PALOUSE LAND COMPANY, a Corporation; PALOUSE MILL COMPANY, a Corporation, and A. F. PUGH, Plaintiffs,

vs.

JACOB SLAGHT, Defendant.

Second Amended Complaint.

76 Plaintiffs for second amended complaint and cause of action against said defendant, allege,

I. That the Spokane & Palouse Railway Company is a corporation organized and existing under the laws of the Territory (now state) of Washington.

II. That the Spokane & Palouse Land Company is a corporation organized and existing under the laws of the state of Washington.

III. That the Palouse Mill Company is a corporation organized and existing under the laws of the state of Washington.

IV. That by the act of Congress approved July 2, 1864, entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast by the Northern Route," and the various acts and joint resolutions of congress supplemental thereto and amendatory thereof, congress granted to the Northern Pacific Railroad Company, lands as follows to-wit, "Every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections of land per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenver on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the general land office: and whenever prior to said time, any of said sections or parts of said sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under
77 the direction of the Secretary of the Interior in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." By the sixth section of said act of July 2, 1864, congreds further provided as follows, to-wit:

"And be it further enacted that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be

fixed; and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be subject to sale, or entry or pre-emption, before or after the- are surveyed except by said Company as provided in this act."

V. That the said Northern Pacific Railroad Company signified its acceptance of the terms, conditions and impositions of said act of July 2, 1864, in writing under the corporate seal of said company, executed pursuant to the direction of its Board of Directors first had and obtained, and within two years of the passage of said act, to-wit, December 29, 1864, served such acceptance upon the President of the United States.

VI. That having surveyed the general route of that portion of its railroad extending from Minnesota across the then territories of Dakota, Montana and Idaho, and across that portion of the territory of Washington lying east of a point on the Columbia River, near the mouth of the Snake river, it fixed that portion of the general route of its road by causing a map thereof, approved by the Secretary of the Interior to be filed in the office of the Commissioner of the General Land Office. That said map of general route was so filed February 21, 1872. That the following described land, to-wit, lots ten, eleven, fourteen and fifteen in section one township sixteen north of range forty-five east Willamette meridian, Washington,
was situated coterminous with that portion of said general
78 route located in the territory of Washington, and was within
forty miles thereof. That March 30, 1872 the Commissioner of the general land office transmitted to the register and receiver of the United States District land office at Walla Walla, Washington, that being the district in which the lands in eastern Washington, including the lands hereinbefore described, were situate, a diagram showing said line of general route so fixed with limits embracing the lands coterminous therewith, and within forty miles thereof indicated thereon, and directed the register and receiver of said district land office to withhold from sale or execution, pre-emption or homestead entry, all the surveyed and unsurveyed odd numbered sections of the public lands within the said limits. That said order of withdrawal and diagram were received at the said district land office April 22, 1872. That the land hereinbefore described was within forty mile limits as designated on said diagram, and was within the terms of said order of withdrawal. That said land was at the date of the grant to said Northern Pacific Railroad Company, at the date when said map of general route of said railroad was filed in the office of the commissioner of the general land office, at the date of said order of withdrawal, and at the date when said order of withdrawal and diagram were received at the United States district land office at Walla Walla, Washington, public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and it was at all of said times free from pre-emptions of other claims or rights; and said land was and is agricultural land. Plaintiffs further allege that thereafter the Northern Pacific Railroad Company caused the line of said railroad and telegraph, extending from a point in township seven north of

range thirty-one east Willamette Meridian, Washington, northeasterly to a point in section sixteen, township twenty-five North
79 of range forty-three, east of Willamette Meridian, Washington, to be surveyed and definitely located, and on the 4th day of October A. D. 1880, fixed the definite location of said portion of its railroad and telegraph line by causing a plat thereof, approved by the secretary of the interior, to be filed in the office of the commissioner of the general land office. That the said land hereinbefore described was located coterminous with, and more than forty, but within fifty miles of said portion of said railroad and telegraph line thus definitely fixed. That on November 13, 1880 the commissioner of the general land office transmitted to the register and receiver of the United States district land office at Colfax, Washington territory, that being the district in which the said lands hereinbefore described was situated a diagram showing the said line of railroad and telegraph so definitely fixed, with limits indicated thereon, including the lands coterminous with said line, and within forty and fifty miles thereof, the first named of forty mile limit including lands hereinafter designated as the place limits, and the fifty mile limits, including the lands hereinafter designated as the indemnity limits, and directed the register and receiver of the said district land office to continue the reservation of all lands theretofore withdrawn by the Commissioner's order of March 30, 1872, and hereinbefore referred to, and in addition to withhold from sale or entry all the odd numbered sections and part- of sections surveyed and unsurveyed, to the extent of fifty miles from said line and directed that said order should take effect from October 30, 1880. That said order of withdrawal and diagram were received in the said district land office November 30, 1880. That the land hereinbefore described was at the date when the line of the said Northern Pacific Railroad coterminous therewith was definitely fixed, as aforesaid, and at the date of the making of the said order of with-
80 drawal, to-wit, November 13, 1880, and at the date when said order and diagram were received at the United States district land office at Colfax, to-wit, November 30, 1880, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated except by virtue of the said withdrawal for the benefit of the said Northern Pacific Railroad Company, as herein set forth; and it was at all of said times free from pre-emption or other claims or rights, except for the claims and rights of the said railroad company. That thereafter said Northern Pacific Railroad Company proceeded with the construction of that portion of its said railroad and telegraph line, extending on, over and along said line of definite location, so fixed as aforesaid, and completed the same prior to November, 1881. That thereupon the President of the United States, appointed three commissioners to examine said portion of said railroad and telegraph line; and that the said commissioners having carefully examined the same, on the 4th day of November, 1881, reported that the said portion of the said railroad and telegraph line had been constructed and completed as required by the act of con-

gress approved July 2, 1864; and the said report was duly approved, and said railroad and telegraph line accepted by the President of the United States on the 26th day of November, 1881.

VIII. Plaintiffs further aver that prior to the year 1888 the said Northern Pacific Railroad Company definitely fixed the line of its railroad extending from a point on Lake Superior to a point at or near the town of Wallula, in the territory (now state) of Washington and extending from a point in the City of Portland, Oregon, to a point near the City of Tacoma, in the territory (now state) of Washington, and definitely fixed the line of the branch of said railroad extending from a point at or near the town of Pasco in
81 the territory (now state) of Washington, to the said City of Tacoma, on Puget's Sound, and prior to said year constructed and caused to be constructed, and put in operation a continuous line of railroad and telegraph extending on, over and along the line of definite location of said railroad fixed as aforesaid. That as fast as portions of said railroad and telegraph line, equal to or exceeding twenty-five miles in length, were so constructed as aforesaid, they were examined by commissioners appointed by the president of the United States, and by said commissioners were found and reported to have been constructed in a good substantial and workmanlike manner in all respects as required by said act of congress. That such reports were accepted and approved by the president of the United States as provided by said act of congress approved July 2, 1864. That at the date of fixing the definite location of said railroad and telegraph line certain odd numbered sections and parts of odd numbered sections situate opposite to and within the distance of forty miles of said line of said definite location in the territories, and within twenty miles of said line in the states, had been reserved, sold, granted, or otherwise appropriated by the United States, and pre-emptions or other claims or rights had attached thereto. That the area of the lands which were within the place limits (forty miles in the territories and twenty miles in the states) of said grant and included in odd numbered sections which were thus reserved, sold, granted, and otherwise appropriated and to which pre-emption and other rights and claims had attached, and which were mineral lands,—being the lands in lieu of which said Northern Pacific Railroad Company had a right to select indemnity—amounted to 10,624,746.27 acres. That the area of lands within the first indemnity limits of the said Northern Pacific grant, to-wit coterminous with said line and within the forty and fifty mile limits in
82 the territories and the twenty and thirty mile limits in the states, which were at the date of the definite locations of the line of said railroad coterminous therewith, not mineral public lands included in odd numbered sections and subject to selection by said railroad company, did not exceed 7,177,769.71 acres, and there was not then, nor has there been at any time since sufficient lands within the limits designated in the act of congress approved July 2, 1864, subject to the grant to the Northern Pacific Railroad Company to give to said Company the quantity of lands granted *by* it by the said act of congress approved July 2, 1864.

IX. That on or about December 15, 1883, the said Northern Pacific Railroad Company applied at the United States District land office in the district in which said lands were situate, to select, and selected, the said lots ten, eleven, fourteen and fifteen in section one township sixteen North of range forty-five, east W. M. Washington, with other lands as indemnity, as lieu of lands within the place limits of the grant to said company, and which had been reserved, sold, granted or otherwise appropriated, or to which preemption or other claims or rights were attached at the date when the line of said Northern Pacific Railroad coterminous therewith was definitely fixed by filing a plat thereof in the office of the commissioner of the general land office being lands in lieu of — the said railroad company was authorized to take other lands by the terms and provisions of the said act of congress approved July 2, 1864. That said lands were so selected by the Northern Pacific Railroad Company by filing a list thereof, prepared in the manner and form prescribed in the rules and regulations of the interior department, in the United States District Land Office, and tendering and paying to the receiver of the said United States land office all fees which the said company
83 was by law and by the rules and regulations of the interior department required to pay to said receiver upon the selection of lands. That said list was accepted, allowed and approved by the register and receiver of the said district land office on December 17, 1883, and the said fees so tendered to said register and receiver, accepted, and thereafter the said list was transmitted to the office of the Commissioner of the general land office for approval. That, at the date of the filing said list, and of the acceptance allowance and approval of said selection by the said United States district land officers as aforesaid, the said land hereinbefore described was public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights, except such reservation, appropriation, claim and rights as had attached thereto in favor of the said Northern Pacific Railroad Company hereinbefore set forth. That thereafter to-wit October 26, 1887, the said Northern Pacific Railroad Company, in compliance with other and additional instructions of the said officers of the interior department of the United States, filed a certain list, designating the losses in lieu of which the said lands described in said selection list filed December 17, 1883, as aforesaid, were selected; which said other and additional instructions were issued and given after said selection had been accepted, allowed, and approved as aforesaid. That thereafter to-wit in the years 1892 and 1893, the said Northern Pacific Railroad Company, in compliance with other and additional instructions, issued by the officers of the interior department of the United States, subsequent to the acceptance, allowance and approval of said selection, made as aforesaid, rearranged said list of losses and said selection list so that the loss for which each tract of land selected by the company had been taken should be specifically designated. That, as appears from said rear-
84 ranged list the said lands hereinbefore described were selected in lieu of certain lands included in section seven, township

nine North of range fifteen east W. M. Washington, which said last described land was located coterminous with and within forty miles of the line of the said Northern Pacific Railroad as definitely fixed, and was, at the date of the grant to the said Northern Pacific Railroad Company and at the date when the line of said Northern Pacific Railroad coterminous therewith was definitely fixed as aforesaid, included in a reservation of lands set apart for the Yakima Indians.

X. That after the selection of said land by the Northern Pacific Railroad Company, to-wit, on or about December 24, 1885, the said Northern Pacific Railroad Company entered into a contract in writing with the Plaintiff William L. Powers to convey lots 3, 6, 11, and 14 in said section one, township sixteen north of range forty-five east, upon payment by said Powers to the said railroad Company of the sum of $822.00. That thereafter the said Powers having paid to the said railroad Company the said sum, the said railroad company, on or about August 4, 1887, made, executed and delivered to the said Powers its certain instrument in writing, conveying to the said Powers the said lots last hereinbefore described, and all thereof. That on or about July 30, 1887, the said Northern Pacific Railroad Company, made, executed and delivered its certain instrument in writing to the said plaintiff William L. Powers, wherein and whereby it conveyed to the said plaintiff lots 2, 7, 10 and 15 in said section one township sixteen North of range 45, east W. M. Washington, said lands so settled upon aggregating in area — acres. That shortly thereafter the said Duffield sold and assigned his possessory rights and improvements to one L. M. Rhodes. And thereafter he
85 the said Rhodes, having failed to pay for said possessory rights and improvements, the said right and improvements were assigned to the said plaintiff William L. Powers, who settled thereon in 1881, with the expectation and intention of purchasing said lands, or a portion thereof, from the said railroad company. That soon after such settlement the said Powers offered to purchase lots 2, 7, 10 and 15 from the said railroad company, and at the same time one John G. Powers, a brother of said plaintiff William L. Powers offered to purchase lots 3, 6, 11 and 14 from said company. That thereafter the said plaintiff William L. Powers, purchased the said lands from the said railroad Company, as hereinbefore set forth, having prior to said purchase taken a relinquishment from the said John G. Powers of all interest in and to lots 2, 7, 10 and 15. That defendant Slaght on or about March 1, 1883, rented and leased said lot ten of and from said William L. Powers, and under and in pursuance of said renting and leasing from said Powers said Slaght was to, and did receive and take possession of said lot ten on or about said date; that plaintiffs allege that in and by said contract said Slaght agreed to and did pay rental to said Powers for the use and occupation of said premises from the date said Slaght received and took possession thereof until on or about the 31st day of October, 1887. That on October 31, 1887, the said defendant Slaght presented an application at the United States District land office for the district in which said land was situate to enter the said described lots 10, 11, 14 and 15 in section 1, township 16, North of range 45 east

W. M. Washington, as public lands of the United States, under the act of congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain." That in the said application the said Slaght alleged that he had settled and established his actual residence upon the said lands March 3, 1883, and that such residence had been thereafter continuous, and that he had built a house on said lands and improved the same. But
86 plaintiffs aver that said settlement, occupation and improvement by Slaght were under and in pursuance of said renting and leasing of and from the said Powers as hereinbefore set forth and not otherwise. Plaintiffs further aver that the Northern Pacific Railroad Company, having been notified of the application of said Jacob Slaght to enter said land, filed its objections against the allowance thereon, on or about December 2, 1887. That thereupon a hearing was ordered by the United States district land officers for the district in which said land was situated for the purpose of determining the rights of the said railroad company and the said Jacob Slaght, in and to the said described land. That thereupon such proceedings were had in said contest that said United States District land officers, on or about the — day of July, 1899, held that the said land was excepted from the operation of the selection of the said Northern Pacific Railroad Company, by reason of the settlement of this plaintiff William L. Powers, and that the said defendant Slaght had settled upon said land as a tenant of said Powers. That thereafter the said Northern Pacific Railroad Company appealed from said decision to the commissioner of the general land office, and such further proceedings were taken and had in said contest that on the 13th day of April, 1895, the said commissioner of the general land office made and rendered his certain decision in said contest, in the words and figures following, to-wit.

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 13, 1895.

JACOB SLAGHT
vs.
NOR. PAC. R. R. CO.

Involving Homestead Application for Lots 10, 11, 14, 15, Sec. 1, 16 N., 45 E.

Register & Receiver, Walla Walla, Washington.

SIRS: I have considered the contest of Jacob Slaght *vs.*
87 Northern Pacific Railroad Company and William L. Powers intervenor, involving lots 10, 11, 14, 15, Sec. 1, T. 16, N. R. 45, East, the record of which was transmitted with your letter of July 10, 1889, on appeal by Jacob Slaght, and said railroad Company from your decision in favor of William L. Powers, intervenor.

The land is in the limits of the withdrawal upon the line of the amended general route of said road, the map showing which was

filed Feb. 21, 1872, and upon the definite location of the road it fell within the indemnity limits, the order of the withdrawal of which was received at the local office November 30, 1880.

These withdrawals have been held by the department to be without authority of law and of no effect (17 L. D. 8 and 18 L. D. 87).

On December 17, 1883 the company selected the land in question under act of July 2, 1864 (13 stat. 356) Per list No. 1 and on the same day said company selected the land under acts of July 2, 1864, (13 stat. 356.) and May 31, 1870 (16 stat. 376) for indemnity purposes per amendatory list No. 2.

On October 31, 1887 Jacob Slaght presented an application to make homestead for this land, and alleged that he settled and established his actual residence thereon March 4, 1883, and the same has been continuous; that he built a house 12 x 14 feet, a kitchen 10 x 12 feet, a stable, dug a cellar and broke a garden spot and built a half mile of fence and that his improvements are worth about $275.00.

The company was duly notified of said application and filed its objections against the acceptance of the same Dec. 2, 1887.

Upon the issuance of notice to the parties in interest a hearing in the case was had and concluded April 4, 1889, at which all parties were represented.

The testimony adduced at the hearing on behalf of Slaght shows that he established his actual residence on the land in March
88 1883, that he broke and planted a garden, that within a few days after moving in the log house on the land he built an addition thereto, that in September 1883 he built a house 12 x 14 feet, a kitchen, a stable, a chicken house, dug a cellar and fenced about 80 acres; that his residence on the above described tracts of land has been continuous since March 1, 1883, and that his improvements are worth about $400.00 and that he is a qualified settler.

The testimony adduced at the hearing on behalf of the defendants is to the effect that William L. Powers has resided in Palouse City Whitman County, Washington, and on sec. 1, T. 16 N. R. 45 E. for thirteen years; that prior to Slaght's residence on the land in question, a part of it was claimed by John G. Powers, a brother of the intervenor. That Slaght went into possession of the land by renting it from the said William L. Powers; that Slaght established himself on the land in 1883 and is still residing thereon; that a portion of this land has been platted as an addition to the town of Palouse City, previous to which Slaght had lived on the land for two years; that Slaght's residence is on lot 10 and when he first settled upon the place he paid a small rental to William L. Powers, that the intervenor has resided upon lot 7, sec. 1, T. 16 N. R. 45 E. since 1881; that he intended to get title to the land involved in this case from the Northern Pacific Railroad Company under its grant of July 2, 1864 (*supra*). That William L. Powers has exhausted all his rights under the public land laws except his timber culture right; that in 1877 A. M. Duffield settled upon and laid claim to lots 2, 3, 6, 7, 10, 11, 14, 15 sec. 1, T. 16, N. R. 45 E. who

shortly thereafter sold his possessory rights and improvements to L. M. Rhodes taking his (Rhodes') notes for $650 who could not meet the notes and accordingly he relinquished his rights to William L. Powers, who offered to purchase lots 2, 7, 10 and 15
89 from said railroad company, and at the same time John G. Powers, a brother of William L. Powers, offered to purchase lots 3, 6, 11 and 14 from said company; that William L. Powers built a log cabin on lot ten in 1879, plowed and planted about six acres to grain and continued to cultivate it; that in 1885 he cleared lot 10 and part of lot 11, and raised two crops thereon: that in the spring of 1881 he built a house on lot 7 and moved into it in June 1881, and has made it his home ever since; that on September 1, 1879, said railroad company mortgaged lots 2, 7, 10, 15, 3, 6, 11 and 14 sec. 1 T. 16 N. R. 45 E. to the Farmers' Loan & Trust Company of New York City on July 13, 1887, Lots 2, 7, 10 and 15 were bargained, sold and deeded to William L. Powers and on August 4, 1887, lots 3, 6, 11 and 14 were bargained, sold and deeded to William L. Powers, and in the settlement William L. Powers took a relinquishment from John G. Powers of all his rights to lots 2, 7, 10 and 15 he (Willia- L. Powers) paid said railroad Company $1249.28 for the said eight lots.

You hold that the land in question is excepted from the operation of the Company's selection by reason of the settlement of the said William L. Powers and that the same should be held as public land and subject to his right to purchase under section 5 of the act of March 3, 1887 (24 stat. 556) or act of January 13, 1881 (21 stat. 315) and that Slaght settled on the land as the tenant of Powers.

The basis of your decision is not well founded:—

1st. For the reason that Powers did not apply to purchase the land prior to the passage of the act of March 3, 1887 (*supra*).

2nd. Because no act to purchase under said act of January 13, 1881 (*supra*) has been made within the prescribed time; that he was not qualified to purchase under said act; not having exhausted his timber culture right, and besides such application to
90 purchase shall not cover more than 160 acres, and, again it appears as an after thought, to secure title to this land under the latter named act, as the same was purchased from the railroad company in 1887 under the grant of July 2, 1864, (*supra*).

Therefore in view of this showing you- decision in favor of William L. Powers is hereby reversed likewise your decision adverse to Jacob Slaght.

Your opinion that said company's selection as to this land was improperly allowed and that the company had no right to the land prior to its selection and as the same was occupied and improved as the home of a settler, Slaght's, at the date of selection, that such selection as to the land in question should be cancelled in accordance with the uniform practice of the Department and I concur therein.

Accordingly, amendatory list No. 2 of selection of Dec. 17, 1883,

by said company is hereby held for cancellation as to said lots 10, 11, 14 and 15 sec. 1, Twp. 16, N. R. 45 E.

The usual time sixty days, after notice will be allowed the railroad company and William L. Powers within which to appeal to the Hon. Secretary of the Interior.

Should this decision become final Slaght will be permitted to make homestead entry for this land; you will advise him of this action.

At the proper time you will make due report as to the action taken in the premises.

Messrs. Britton & Gray, the resident attorneys, of said railroad Company will be advised hereof by this office.

Yours respectively,

(Signed) S. W. LAMOREUX,
Commissioner."

91 That thereafter the said Northern Pacific Railroad Company appealed from decision of the general land office to the secretary of the Interior. That the said secretary of the interior on or about the — day of —— 1896 affirmed the said decisions of the commissioner of the general land office, and thereafter to-wit on the — day of —— 1897 the officers of the Interior department made, executed and delivered to the said defendant, Jacob Slaght, letters patent under the great seal of the United States, purporting to convey to the said defendant, Jacob Slaght, the said lots 10, 11, 14 and 15 in section 1, township 16 north of range 45 East W. M. Washington. But plaintiffs further — that said letters patent were issued under a misconstruction and misinterpretation of the law; that long prior to the settlement upon said land by the said Jacob Slaght, the said lands, and each and all thereof, had been reserved for the use and benefit of the said Northern Pacific Railroad Company, as hereinbefore set forth. That the plaintiff William L. Powers settled upon said lands with the intention of purchasing the same from the said Northern Pacific Railroad Company. That, by reason of the premises, the said land was subject to selection by said Northern Pacific Railroad Company at the time the same was selected by said company, as hereinbefore set forth, and that thereby the said Northern Pacific Railroad Company acquired the title in and to said described lands, and at the time the said defendant, Jacob Slaght, applied to enter said land, and at the date of the said hearing in said contest hereinbefore set forth, and at the date of the issuance of said letters patent, as aforesaid, the said land was not, nor was it at any of said times, public land subject to settlement or entry under the land laws of the United States other than the said act of congress approved July 2, 1864, granting land to the said Northern Pacific Railroad Company, and that the said officers of the interior
92 department of the United States were without authority to issue said letters patent purporting to convey the said land to the said defendant Jacob Slaght, because the said United States had long prior to the issuance of said letters patent parted with the

title to the said described lands and each and all thereof, to the said Northern Pacific Railroad Company. Plaintiffs further aver that in the rendition of the said decision by the commissioner of the general land office, and by the secretary of the Interior, as hereinbefore set forth, the said officers of the interior department misconceived and misconstrued the law, and the same, or any part thereof is not the law.

XI. Plaintiffs further aver that the said plaintiffs Hattie Dean, Edward Deane, F. S. Bell, Ivan Chase, J. R. Malhern, John K. McCornack, Ann J. Clyde, Spokane & Palouse Railway Company, Spokane & Palouse Land Company, Palouse Mill Company, and A. F. Pugh assert and claim title to certain portions of the said lands hereinbefore described under and by virtue of certain instruments in writing duly made, executed and delivered to them by the said plaintiff, William L. Powers, and his grantees, conveying to them, the plaintiffs last above named, certain lots and parcels of the land hereinbefore described.

XII. Plaintiffs further aver that the said plaintiff William L. Powers has heretofore and by his certain instruments in writing, duly made, executed and delivered and conveyed certain other portions of said described land to various parties, and has in said instruments in writing covenanted and agreed to and with the said grantees therein named, that he would warrant and defend the title so conveyed to the said grantees.

XIII. That the questions involved and to be determined in this action are of common and general interest to many persons,
93 and the parties interested herein are so numerous that it is impracticable to bring them before the court.

XIV. That plaintiffs and said numerous other persons are the owners in fee simple, and have an indefeasible title, and are in possession of the following described premises in the County of Whitman, in the State of Washington, to-wit, Lots 10, 11, 14 and 15 section 1 in Township 16, North, of Range 45 East of the Willamette Meridian, and the said defendant claims an interest or estate therein adverse to the said plaintiffs, which claim of defendant is without any right whatever, and said defendant has not any estate, right, title, or interest whatever in said land or premises or any part thereof.

XV. That defendant is threatening to commence divers and sundry suits in ejectment, and without suit forcibly to dispossess and eject plaintiffs and said numerous other parties of and from said premises, or a portion thereof, and unless enjoined and restrained by an order of this honorable court, will so bring said suits, and will also without suit forcibly enter said premises and with force, and without any right whatever, eject and dispossess plaintiffs and said numerous other parties; that thereby a multiplicity of suits will be caused and great costs and injuries inflicted upon these plaintiffs and divers and numerous other parties having a common and general interest with plaintiffs in and to the said premises, or some part thereof, and that thereby the Courts of this state will be greatly and unnecessarily burdened, and great and irreparable injury will

be wrought to these plaintiffs, and said numerous other parties having common and general interest in the questions involved herein.

Wherefore plaintiffs pray,—

1. That said defendant may be enjoined and restrained
94 from selling or attempting to sell, the lands hereinbefore described, or any part thereof and from bringing separate or independent suits against these plaintiffs, or against any other person or persons, interested in the questions or the premises and property hereinbefore described, or any part thereof, and from seeking to eject or dispossess with or without suit, said plaintiffs or said other persons, or any or either of them from said lands, or from any part thereof.

2. That a preliminary restraining order and injunction may be issued enjoining and restraining the said defendant, as aforesaid, until the final determination of this suit.

3. That the defendant may be required to set forth the nature of his claim and that all adverse claims of the defendant may be determined by a decree of this Court.

4. That by said decree it be declared and adjudged that, the defendant has no estate, right, title or interest, whatever, in or to said land, and premises, or any part thereof, and that the titles of plaintiff- and said numerous other persons and parties having a common and general interest in and to said premises, or a portion thereof, be decreed good, valid, indefeasible fee simple, and free from all claims of said defendant.

5. That defendant be forever enjoined and debarred for asserting any claim whatever in or to said land and premises adverse to plaintiffs and said other parties, and the alleged claims of defendant be cancelled, for naught held, and be decreed null and void, and defendant be required to surrender the same, and be required to convey said alleged claim to plaintiffs and said other persons.

6. That the said letters patent issued to the said Jacob Slaght as aforesaid, may be declared to have been issued under a misconstruction of the law and to be void and to constitute clouds upon the titles of these plaintiffs, and of the various persons to whom
95 the said plaintiff William L. Powers, has conveyed any portion of the said land as aforesaid.

7. That the said defendant Jacob Slaght may be decreed to be a trustee holding such right, title and interest in and to said lands as he may have acquired under and by virtue of said letters patent, as aforesaid, if any, for the benefit of the said plaintiff William L. Powers and his grantees, both direct and through *means* conveyances and that the said defendant Jacob Slaght may be required to convey such right, title and interest if any, to the said plaintiff William L. Powers, and his grantees as aforesaid.

8. For such other and further relief in the premises as shall to the Court seem meet, proper and agreeable to equity.

9. That plaintiffs may have judgment for their costs and disbursements in this action.

STOLL, STEPHENS, BUNN & MACDONALD,
Attorneys for Plaintiffs.

STATE OF WASHINGTON, *County of Spokane, ss:*

F. D. Gibbs, being first duly sworn, upon oath deposes and says—that he is an officer of the said plaintiff Spokane & Palouse railway Company, to-wit, its general agent, located at the City of Spo. That he is an officer of the said plaintiff Spokane & Palouse railway Company is one of the plaintiffs in the above entitled action, and affiant makes this affidavit for and on behalf of said plaintiff; that affiant has heard read the foregoing second amended complaint and knows the contents thereof and that the same is true as he verily believes.

F. D. GIBBS.

Subscribed and sworn to before me this 19th day of February, 1898.

[SEAL.] E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington."

96 10th. That to said amended complaint the defendant demurred on the ground that said amended complaint does not state facts sufficient to constitute a cause of action against the defendant.

11th. That thereafter the said Superior Court made and entered its ruling on said demurrer, which was in words and figures — follows, omitting the title, to-wit:

"The demurrer of the defendant, to the second amended complaint of plaintiff herein, came on regularly for hearing and determination on the 13th day of June, 1898, and plaintiffs and defendants appearing by their respective counsel, and after argument, and the Court having been fully advised in the premises it is ordered that the said demurrer be, and the same is, hereby sustained.

Whereupon plaintiffs announced that they desire to stand upon their second amended complaint, and decline to further plead. Thereupon defendant moved the Court for an order dismissing the action of the plaintiffs herein, which motion was granted by the Court. Plaintiffs excepted to the order and ruling of the Court sustaining said demurrer also to the order and ruling of the court sustaining a motion of defendant to dismiss the above entitled action which objections were, and they are hereby allowed by the Court.

Wherefore it is ordered and adjudged by the Court that the above entitled action be, and the same is hereby dismissed at plaintiffs' costs and that defendant do have and recover of and from plaintiff his cost and disbursements herein taxed at seventeen dollars.

Done in open Court this 15th day of June, 1898.

WILLIAM McDONALD, *Judge."*

97 12th. That thereafter and on to-wit the 24th, day of June 1898, the plaintiffs in said action appealed from said order and final judgment sustaining the demurrer of the defendant to plaintiffs' second amended complaint, and dismissing the action o

plaintiffs herein and for costs, to the Supreme Court of the State of Washington.

13th. That thereafter and on to-wit the 14th day of January 1899, the said Supreme Court of the State of Washington, made and entered its judgment in said Court, which omitting the title, is in words and figures following to-wit,

"This cause having been heretofore submitted to the Court upon the transcript of the record of the Superior Court of Whitman County, and upon the argument of counsel, and the court having duly considered the same and being fully advised in the premises, and having filed and submitted its opinion in writing, now on the 14th day of January, 1899, on motion of Wyman & Neill, of counsel for respondent, considered, adjudged and decreed that the judgment of said Superior Court be, and the same is hereby affirmed with costs, and that the said Jacob Slaght have and recover of and from said William L. Powers *et al*, and from F. H. Mason surety the costs of this action taxed and allowed at $88.75 and that execution issue therefor. And it is further ordered that this cause be remitted to the said Superior Court for further proceedings in accordance with the opinion herein filed."

and thereupon the Clerk of said Supreme Court transmitted a certified copy of said judgment to the Clerk of the Superior Court and was by him filed therein on January 20, 1899.

14th. That thereafter the said plaintiffs took said case to the Supreme Court of the United States on a writ of error, and the said Supreme Court having considered the same, did on the 23rd
98 day of February in the year of our Lord 1901, affirm the said judgment of the Supreme Court of the State of Washington, as aforesaid.

15th. That on to-wit, and prior to and about and during the year of 1887, the said Spokane "Palouse Railway Company constructed its line of railroad from Spokane, Washington, to Genesee, Idaho, and operated said line of railway for the carriage of freights and passengers and until the 21st day of February, 1899.

16th. That on said 21st day of February, 1899, the said Spokane & Palouse Railway Company transferred and conveyed to the defendant, the Northern Pacific Railway Company, all its property and all its right, title and interest in and to its railroad bed, rails, and equipments, and all its right title and interest in and to the right of way, for said railway.

17th. That on the said 21st day of February, 1899, the said Spokane & Palouse Railway Company had no right, title, interest or estate in or to any portion of said right of way, nor did they at any time prior thereto, or since have or acquire any right, title, interest therein by deed, contract or conveyance of any kind, or by proceedings for condemnation thereof or in any other manner or at all.

18th. That the said Spokane & Palouse Railway Company was on said day, and prior thereto in possession of and occupying said right of way for railroad purposes under and by virtue of said deed from William L. Powers to it, as aforesaid, and not otherwise, and without the consent of this plaintiff, and against the will and protest

of this plaintiff, and the said defendant Northern Pacific Railway Company as grantee and assignee of the said Spokane & Palouse Railway Company has been occupying said right of way, and using the same for railroad purposes against the will and wish and protest of this plaintiff, and without his consent.

99 19th. That said defendant Northern Pacific Railway Company has not acquired by deed, contract or conveyance of any kind or by condemnation proceedings of any kind, nor has the said defendant at any time commenced condemnation proceedings to acquire the title to or the right to any portion of said right of way, or to acquire the title or the right of way over and across any parcel of said lots ten and eleven as aforesaid.

20th. That the said Spokane & Palouse Railway Company constructed, built and erected its railroad and structures on said land, without the consent of, and against the protest and objections *the* made by plaintiff, to it before said railroad was constructed, and all times and that said Spokane & Palouse Railway Company erected and constructed said railroad and the structures appertaining thereto in violation of the rights of this plaintiff and well knowing the claim of the plaintiff to the ownership of all of said lots ten and eleven as aforesaid.

21st. That for the purpose of carrying passengers, freights and United States mail, between Spokane, Washington, and Lewiston, Idaho, and operating said railway, a space of ten feet would be sufficient over and across said lots ten and eleven for its road bed, and in addition thereto a space of 50 x 100 feet would be ample ground on which to erect and maintain a depot on said tract for the loading and unloading of freights, passengers and United States mail at the City of Palouse.

Wherefore plaintiff renews the prayer of his complaint.

THOMAS NEILL,
W. E. McCROSKEY,
Attorneys for the Plaintiff.

100 STATE OF WASHINGTON, *County of Whitman, ss:*

Thomas Neill, being first duly sworn, on oath, says: That he is one of the attorneys for plaintiff in the above entitled action; that he has read the foregoing Reply knows the contents thereof, and believes the same to be true: That he makes this verification on behalf of plaintiff for the reason that the material facts therein alleged are within the knowledge of affiant.

THOMAS NEILL.

Subscribed and sworn to before me, this 10" day of February, 1903.

W. W. RENFREW,
Deputy County Clerk in and for the State of Washington, Residing at Colfax, in said State.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 10th day of February, 1903. Journal — Page — Execution Docket — W. O. McCaw, County Clerk, By W. W. Renfrew, Deputy.

101 In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Interrogatories Propounded by Defendants.

Interrogatories propounded by and on behalf of defendants and each of them to the plaintiff, and to be answered under oath by the plaintiff, for the discovery of facts and documents material to the support of the defense of the defendants to the action herein.

Interrogatory No. 1: State whether or not you are the plaintiff in this action.

Interrogatory No. 2: State when the railroad built by the Spokane and Palouse Railroad Company, or caused to built by it, was constructed upon and over the premises in controversy in this action, that is, give the date of commencement of the grading for said road and the time of the completion of the said grading, and the time of the commencement of the laying of ties, and the time of the completion of laying of ties, and the date of laying rails upon the ties, as nearly and as fully and with as much detail as possible.

Interrogatory No. 3: State whether you knew of the pro-
102 posed construction of said railroad upon and over the premises in controversy prior to such erection and construction thereof, and, if so, when and how did you obtain such information?

Interrogatory No. 4: Where were you during the period of the construction and completion of said railroad and at the times and dates mentioned in your answers to interrogatories Nos 2 and 3.

Interrogatory No. 5: State, if you know, who was actually constructing the railroad or different parts or portions thereof, that is, who did the grading, who laid the ties, and who laid and spiked the rails, and who was in actual charge of the work of constructing said road or any part thereof, that is, who was in charge of the grading, who was in charge of the laying of ties and who was in charge of the laying of the rails, if you know.

Interrogatory No. 6: State when, if at all, the survey was made for the said railroad, and when and how and by whom the survey was made, and whether the survey was marked by stakes or monuments and whether or not the road was built upon any line surveyed or staked out or marked, and when so marked or staked out and the manner of making such survey and the marking and staking thereof.

Interrogatory No. 7: State when the first work train was operated upon and over the railroad track where it crossed the premises or ran upon the premises in controversy in this action.

Interrogatory No. 8: State when the first passenger or freight train was operated upon or over the said railroad.

103 Interrogatory No. 9: State what objections, if any, you made to the survey or surveys made upon or over the premises in controversy, if any was or were made, and what objections, if any, you made to the erection or construction of said railroad and when and where and how and to whom you made such objections, and if same were in writing, attach copies thereof to your answer to this interrogatory.

Interrogatory No. 10: State whether or not there is now a town known as Palouse or Palouse City in the vicinity of the premises in controversy, and, if so, whether it is a municipal corporation and when it was organized and incorporated as a municipal corporation, and what the population thereof was, whether incorporated or not, during the year 1886 and during the year 1887, and what the population is now.

Interrogatory No. 11: State whether or not the government lots mentioned in the pleadings herein were more valuable before the building of the railroad or less valuable than after the building of the railroad.

Interrogatory No. 12: State whether or not the government lots mentioned in the pleadings herein, with the railroad across them, and deducting therefrom the amount of the right of way claimed by defendant Northern Pacific Railway Company, is of less or more value at this time and ever since the building of said railroad than the whole of the government lots without said railroad thereon and thereover was worth before the building of said railroad.

104 Interrogatory No. 13: State whether or not the building of the railroad upon and over the premises in controversy has caused the town or city of Palouse to be built up and improved and part of the government lots platted and sold as town lots by you.

Interrogatory No. 14: State, if you know, whether or not it would have been advisable or practicable for the said railroad to have been constructed over property other than the government lots mentioned in the pleadings herein.

Interrogatory No. 15: State whether or not valuable and lasting improvements have been made on the premises in controversy, and, if so, what such improvements are and when and by whom they were erected and constructed, if you know, giving in detail the character of such improvements and the value at the present time, if you know such value, and include in your answer to this question railroad bed and bridges, if any thereon.

Interrogatory No. 16: If any of the buildings or improvements upon the premises in controversy were placed, erected or constructed thereon by any other person or persons then the Spokane and Palouse Railway Company, or its successor in interest, the Northern Pacific Railway Company, give the name or names of such person or persons and what improvement or improvements, if any, such person or persons placed, erected or constructed upon said premises and what, if any, objections you made to such person or persons

when he, she or they were placing, erecting and constructing said improvements or buildings upon the premises in controversy, and how and where such objections were made, and, if same were in writing, attach copies thereof to your answer to this interrogatory.

105 Interrogatory No. 17: State who was present at each and all the times and dates that you made, or claimed that you made, objections to the erection, construction or maintenance of the railroad or buildings or improvements upon the premises in controversy or any part thereof, and where and when such objections, if any, were made, and to whom were they made?

Interrogatory No. 18: State where you have lived and what, if any, knowledge you have with reference to the construction, erection and maintenance of the railroad or any building or improvements upon the premises in controversy in this action, and how you acquired such knowledge or information, and whether you saw the said matters and things or any or either of them being erected, constructed, maintained or operated, and also state where you lived and what opportunity you had to observe the erection, construction or maintenance of the said railroad or any building or improvement upon the premises in controversy in this action or any part thereof.

Interrogatory No. 19: What, if any, action, actions, proceeding or proceedings did you ever commence or prosecute in any court or any tribunal (other than the United States Land Office) relative to the land in controversy, and against whom?

Interrogatory No. 20: Did you ever commence or prosecute any action, actions, proceeding or proceedings, and if so, what, when, where and against whom, to stop or restrain the erection, construction, maintenance on or occupancy of the premises in controversy as a railroad right of way and matters and things incident

106 thereto or on what defendant Railway Company claims as a right of way, or to procure the possession thereof or damages for detention of said premises.

STEPHENS AND BUNN,
Attorneys for Defendants.

JAMES B. KERR,
Of Counsel.

STATE OF WASHINGTON, *County of Whitman, ss:*

Charles Grant, being first duly sworn, upon oath deposes and says: That he is and was, at all the dates herein mentioned, over the age of twenty-one years and competent to be a witness in the above and foregoing entitled action, not being interested therein; that the attorney for plaintiff in said action is Thomas Neill, Esq., who has his office and resides in the city of Colfax, Whitman County, Washington; that the attorneys for defendants are Stephens & Bunn, who have their office and reside in the city of Spokane, Spokane County, Washington; that there is a daily United States mail between said cities; that, on February 27, 1903, he served the foregoing interrogatories upon the attorney for the plaintiff by depositing, in a sealed envelope, postage prepaid, directed to Thomas Neill,

Esq., Attorney at Law, Colfax, Whitman County, Washington, a full, true and correct copy of said interrogatories.

CHARLES GRANT.

Subscribed and sworn to before me this 27th day of February, 1903.

E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

107 Endorsed: Filed February 28" 1903. W. O. McCaw, Clerk.

108 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Comes now the plaintiff in the above entitled cause, and answers the interrogatories propounded by the defendants herein, subject to the objections heretofore made and filed herein, to each of said interrogatries, said answers to be subject to said objections, reference to which is hereby made, said answers not to in any manner be construed or taken as a waiver of the objections heretofore made and filed against said interrogatories.

I.

In answering interrogatory I plaintiff says "I am the plaintiff in the above entitle action."

II.

In answer to interrogatory II plaintiff can not give the exact dates of the commencement of the grading of the road, or the completion of the grading, or the time of the laying of the ties, or the time of the completion of the laying of the ties, or the date of the laying of the rails upon the ties, but that the Spokane & Palouse Railroad was built across the land in controversy during the years 1886 and 1887.

III.

In answer to interrogatory III plaintiff answers that he had
109 no information, and did not know of the proposed construction of said railroad upon, and over the premises in controversy, prior to the time when they commenced to survey the route for said road over said land and that the only information that he then had was the fact of their making a survey across said land, and the general talk or rumor that it was for a railroad from Spokane to Gennesee.

IV.

In answer to interrogatory IV, plaintiff answers that at the time when he first knew or understood that the road was to be built, and during the time the same was being constructed on the land in controversy, he was residing upon the land in controversy.

V.

In answering interrogatory V plaintiff answers that he does not know the names of the persons actually engaged in the construction of the railroad, or the different parts or portions thereof, that is to say, he did not know the name of the person who was doing the grading, or the name of the person who laid the ties, or who laid the spikes or rails, or who was constructing said road or any part thereof.

VI.

In answering interrogatory VI plaintiff answers that he can not state the exact time when the survey for said road was made, and when or by whom the survey was made, but remembers that there were stakes driven by the surveyors, and that the road was built upon a line surveyed or staked by the surveyors, but can not state and does not know the manner in which said survey was made, or how it was marked or staked.

VII.

In answering interrogatory VII plaintiff answers that he
110 can not state the date on which the first work train was operated upon and over the railroad tract where it crossed the premises, or run upon the premises in this action but to his best recollection it was during the year *the year* 1887.

VIII.

In answering interrogatory VIII plaintiff answers that he cannot state when the first passenger or freight train was operated upon or over said railroad but to his best remembrance it was in the year 1887.

IX.

In answering interrogatory IX plaintiff answers that at the time when the surveyors first entered said land in controversy to make the survey thereof, the plaintiff published in the Palouse News, a weekly newspaper printed and published in Palouse City, a notice of which a copy is hereto attached and marked "Exhibit A," and that said notice was published in said paper weekly for and during the whole time of the construction of said road over and across said land, and during all of the operation thereon, and until after the said road was completed, being continued in said paper for over a year. That no other notice was given of his objection and protest against the construction or building of said road on said premises,

because he was informed and believed that the notice given as above, was all that was necessary to be made in the premises.

That during the time said road was being constructed over and across said premises, and for a long time prior thereto, plaintiff was residing on and occupying and cultivating and claiming all of the land in controversy under the Homestead laws of the United States, and that from 1883 when the plaintiff first made settlement on said land, William L. Powers, the person who made the deed for
111 the right of way to the Spokane & Palouse Railroad Company, was not residing upon said land but was claiming said land under a contract of purchase from the Northern Pacific Railroad Company, and that afterwards and in 1887, a contest was commenced between the plaintiff, and William L. Powers, and the Northern Pacific Railroad Company, which was litigated in the Land Department of the United States, and finally decided in favor of the plaintiff, who afterward received for said land a patent from the Government of the United States.

X.

In answering interrogatory X, plaintiff answers, that there is now a town known as Palouse, formerly known as Palouse City in the vicinity of the premises in controversy, and that it is a municipal corporation and was incorporated as a municipal corporation about 1886 or 1887 and that during 1886 and 1887 its population was about 500 or 600 and the population now is about 1500.

XI.

In answering interrogatory XI plaintiff answers that the land in controversy has been gradually growing in value since 1887, but said increased value did not result from the fact of the railroad being built across said land.

XII.

In answering interrogatory XII plaintiff answers that the land in controversy in common with all lands in Whitman County is of much more value now than it was in 1884-1885-1886 and 1887. That said land would have been worth as much today, if not more, had said railroad not been built over and across said land. That the construction of said railroad over and across said land at the place where it was constructed, destroyed valuable saw mill sites on said land, and that by reason of the controversy over the title
112 of the said land in the land department, and by the litigation in the Courts by the Spokane and Palouse Railroad Company and William L. Powers, plaintiff was deprived or any and all advantages, if any there were, accruing by reason of the boom in prices that was in land adjoining Palouse City, during the years 1890, 1891 and 1892, and that under the claim made by the said Powers and Northern Pacific Railroad Company, a large part of said Government Lots 10 and 11 was sold by Powers for a large sum of money to innocent purchasers which was loss to the plaintiff herein.

XIII.

In answering interrogatory XIII plaintiff answers that in his opinion it was not the construction of the railroad that made Palouse City grow from 600 to 1500 population, but that said growth was brought about by the development of the country, by settlers taking up the Government land in that vicinity and settling and improving the country and by reason of its proximity to lumber and the natural location of the town as a business center. Plaintiff further states that the town of Palouse would have grown had the railroad been located at some other land than the land in controversy. Plaintiff further answers that the plaintiff did not plat any part of the lot 10 or 11 to town lots, but that one William Powers encouraged by the Northern Pacific Railroad Company and its officials, claiming title through the grant of congress to the Northern Pacific Railroad Company, over the protest and objections of this plaintiff, and when the said land was in controversy in the Land Department of the United States, did plat part of said lot into town lots, and sold the same as plaintiff is inforemd for a sum of over $20,000.00, and when said controversy in the Courts was finally settled, and patent issued to the plaintiff herein, said lots were in the possession of *bona fide* purchasers who had bought the same
113 and had constructed homes thereon in good faith and that plaintiff to avoid litigation, and knowing that W. L. Powers was insolvent and that the Northern Pacific Railroad Company was insolvent, and that said purchasers would lose their entire purchase price, and all the improvement made thereon plaintiff was compelled to and did quit claim to said purchasers for a nominal consideration.

XIV.

In answering interrogatory No. XIV plaintiff answers that he is not an engineer, or a railroad man, but that in his judgment it was easier and cheaper to construct a railroad over the land in controversy, than it would have been to have constructed one elsewhere, but that outside of the cost the road could have been made practicable without covering the land now occupied by said road on said premises.

XV.

In answering interrogatory No. XV plaintiff answers that there are now on the land in controversy valuable improvements, which improvements consists of railroad track, depot, railroad bridges, and embankments placed there by the Spokane & Palouse Railroad Company, the value of which plaintiff does not know. There are also grain warehouses on said land constructed by individuals and now claimed and occupied by these defendants in this action, other than the Northern Pacific Railway Company. That said warehouses were constructed during the time, when the land upon which they are situated, was in controversy between the plaintiff and Powers and the Northern Pacific Railroad Company, and the builders thereof well knew and had notice of the fact that said land was in con-

troversy in the land department of the United States, and that plaintiff claimed the same under the laws of the United States, and the said railroad was constructed and said bridges and rails
114 and depot built and constructed on said land with the full knowledge on the part of the Spokane & Palouse Railroad Company that the plaintiff claimed to be the owner of said land under the laws of the United States.

XVI.

In answering interrogatory No. XVI, plaintiff answers that there has been erected and constructed on the land in controversy grain warehouses by individuals and persons other than the Spokane & Palouse Railway Company, or its successors in interest, The Northern Pacific Railway Company, one of which said warehouses was built by C. H. Farnsworth and H. C. Waters in the year 1892, which warehouse is now claimed and occupied by the defendant Miller. The *the* said Farnsworth and Waters *was* notified by the plaintiff not to construct said warehouses on said land, and that the said land belonged to plaintiff, and the said Farnsworth and Waters well knew that plaintiff claimed said land and that the right thereto was in contest and pending in the land Department of the United States, undetermined. That there was a warehouse built thereon that is now occupied by the Washington Grain and Milling Company, and that there were additions built by Miller to the warehouse formerly constructed by Farnsworth and Waters. That no special or particular notice was given by plaintiff to any of the persons constructing said warehouses except Farnsworth and Waters, but that all of said warehouses and the additions thereto were built and constructed during the time said land was in controversy in the United States land office and in the State and Federal Courts as alleged in the plaintiff's answer herein. That during all of said time when said warehouses were being constructed, and from the year 1883 down to and after the issuing of the patent to the plaintiff herein for said Government lots 10 and 11, plaintiff was residing and had resided continuously upon that portion of said Government
115 lots 10 and 11 now claimed by the Northern Pacific Railway Company as a right of way and constituting the premises in this action, the house in which he lived during said time being located inside of fifteen feet from the rails of the said railroad track as then laid and now being, and was openly and notoriously and publicly claiming the title thereto by reason of settlement thereon under Homestead laws of the United States. That each and all of said warehouses are located about 30 feet distant from the rails of the main track of said railroad. Said warehouses are located substantially correct upon the plat marked "Exhibit A" to defendants' answer herein, and that each of said warehouses has been operated since their construction by private individuals, or private corporations for private gain only, and not as part of or in any way connected with the railroad company, nor in any manner

essential or necessary for the operation of said road in the carrying of passengers, freights, and United States mail.

XVII.

In answering interrogatory No. XVII plaintiff answers that he has answered said interrogatory in previous answers to the interrogatories herein. That when personal objections were made, he does not now remember who was present at the time other than the parties to whom said objections were made.

XVIII.

In answering interrogatory XVIII plaintiff states that from 1883 until after the patent was issued to him by the Government of the United States for the land in controversy, he had resided continuously and had his house upon that part of the land now claimed by the defendant Railway Company as a railroad right of way, within fifteen feet of the rails of the main line of said track and at a point about 50 feet West of the line between Government lots 9 and 10 Section One as shown on the plat marked Exhibit
116 A attached and made a part of the defendants' answer herein. That he acquired the knowledge of the construction and erection and maintenance of the railroad and building of the improvements by observation.

XIX.

In answering interrogatory XIX plaintiff answers that no proceedings were commenced or prosecuted in any Court or tribunal by plaintiff other than in the United States Land Office as set forth in the reply relative to the land in controversy, and that all the actions or proceedings that were ever taken or had by or against the plaintiff relative to said land is fully set forth in the reply herein other than the present action.

XX.

In answering interrogatory XX plaintiff answers that he did not commence any action or proceeding to stop or restrain the erection construction or maintenance of the premises in controversy as a railroad right of way before the commencement of this proceeding, or to procure the possession thereof or damages for the detention of the same, and that he did commence these proceedings to recover the possession of said premises as soon as it was possible so to do after the end of the litigation over the title to said property as set forth in his reply herein.

"EXHIBIT A."

Notice is hereby given to all parties whomsoever, not to trespass on my homestead claim which is: "Lots 10-11-14 and 15, Sec. 1, Tp. 16, N. R. 45, E. W. M., Whitman County, W. T.

JACOB SLAGHT.

117 STATE OF WASHINGTON, *County of Whitman, ss:*

Jacob Slaght being first duly sworn deposes and says, That he is the plaintiff in the above entitled action. That he has heard read the foregoing answers to the interrogatories propounded by the defendants herein, and believes the same to be true.

JACOB SLAGHT.

Subscribed and sworn to before me this 25th day of April, 1903.

THOMAS NEILL,
Notary Public for Washington,
Residing at Colfax, therein.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 9 day of May, 1903. Journal — Page — Execution Docket —. W. O. McCaw, County Clerk.

118 In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Stipulation of Facts.

It is hereby stipulated and agreed that for the purposes of the trial of this action the following shall be taken to be true:

I.

The Spokane and Palouse Railway Company was at all times mentioned in the pleadings, and at all times herein mentioned, and still is, a corporation organized under the laws of the Territory of Washington and thereafter existing under the laws of that territory and of the state of Washington, and authorized to construct, maintain and operate a line of railway from Spokane, Washington, to Lewiston, Idaho, and over and across the premises described in the pleadings herein.

II.

That at all the times and dates mentioned in the pleadings and at all times herein mentioned, defendant Northern Pacific Railway Company was, and still is, a corporation duly organized and incorporated under the laws of the state of Wisconsin.

III.

That at all the times and dates mentioned in the pleadings and at all times herein mentioned, defendant the Washington Grain and

Milling Company was, and still is, a corporation duly organized and incorporated under the laws of the state of Washington.

119 IV.

That at all the times and dates mentioned in the pleadings and at all times mentioned herein, defendants John A. Miller and Anna Miller were, and still are, husband and wife.

V.

That the defendants are in possession of the premises described in their separate second amended answer, and shown in the exhibit thereto attached, and claim the same in the manner and as set forth in said answers, and have been in possession and claiming the same as herein stipulated. That the possession of the defendant Railway Company and its predecessor in interest, has been continuous, open and notorious since the year 1886, and they have occupied and used the same as a right of way for railroad continually since the year 1886.

VI.

That the plaintiff and Margaret A. Slaght were prior to the year 1883, husband and wife, and said relations continued until the first day of August, 1898, at which time by a decree of the Superior Court of Whitman County, State of Washington, they were divorced.

VII.

That in March, 1883, the said plaintiff and the said Margaret A. Slaght, as husband and wife, settled upon and established their actual residence on government lots ten (10), eleven (11), fourteen (14) and fifteen (15), section one (1), township 16 north, of range 45 east, of the Willamette Meridian, in Whitman County, Washington, and continued to reside thereon until after the — day of ——, 1897.

VIII.

120 That on the 31st day of October, 1887, the said Jacob Slaght presented, in behalf of himself and his said wife, an application to the United States District Land Office, for the District in which said land was situated to enter lots 10, 11, 14 and 15, section 1, township 16 north, of range 45 East, of the Willamette Meridian, Whitman County, Washington, under act of congress approved May 20, 1862, entitled "An act to Declare Homesteads to General Settlers in the Public Domain," and in said application alleged settlement on said land from March 4, 1883, and that the same had been continuous, and that he had built a house on said land, and had improved the same.

IX.

That upon making said application for said land the said Northern Pacific Railroad Company was notified of said application and the

said Northern Pacific Railroad Company thereupon filed its objections to the allowance of said application and a hearing was ordered by the United States District Land Office for the District in which said land was situated, for the purpose of determining the rights of the Northern Pacific Railroad Company and of the said Jacob Slaght, in and to said described land, and after the hearing was ordered one William L. Powers intervened and a hearing was had and the local officers rendered a decision and held in words and figures as follows, to-wit:

Opinion.

THE N. P. R. R. Co.

vs.

JACOB SLAGHT, with WM. L. POWERS as Intervenor.

Involving Right to Lots 10, 11, 14, 15, Sec. 1, 16, 45.

On October 31, 1887, Jacob Slaght made homestead application for lots 10-11-14-15 Sec. 1, Tp. 16, N. R. 45, E., alleging settlement on said land March 4th, 1883.

121 Nov. 7, 1887 the N. P. R. R. Co. was notified of said application, they having selected said land as Indemnity Dec. 17, 1883.

Dec. 6, 1887 said Company filed objections to said application.

Dec. 20, 1888 the Register and Receiver of this office issued notices in said case ordering a hearing between the parties interested for Feb. 20, 1889, before W. N. Ruby, Judge of Probate at Colfax, W. T.

On said Feb. 20, 1889 all parties interested appeared including one W. L. Powers who by his testimony appears to claim said land by prior settlement and residence under act January 13, 1881 commonly called in this Country the "Brents Act" if said land is declared to be government land.

From the testimony we find that in 1877 one A. M. Dufield first settled upon and claimed this land including lots 2-7-3 & 6 which together with lots 10-11-14 & 15 made 8 lots; that he shortly afterwards sold his possessory right and improvements to said land to one L. M. Rhodes on his notes for $650; that when notes became due he could not pay them, and relinquished his right to W. L. Powers who took up and paid said notes in 1878, settled on the land and offered to purchase the Lots 2-7-10-15 from the N. P. R. R. Company for whose benefit said land had been withdrawn from public settlement and which was being offered for sale by said Company. At the same time Powers' brother John C. Powers applied to said Company to buy Lots 3-6-11-14; That at this time said land was recognized as railroad land; that Wm. L. Powers built a log cabin on Lot 10 in winter of 1878; that in 1879 he plowed and put in grain six acres of said Lot and continued to cultivate said land; that he 1885 he cleared Lot 10 entirely and part of lot eleven; that he afterwards raised two crops thereon; that in 1887 the Spokane and Palouse Railroad run through Lot 11 and put a stop to the cultivation of said lot; that in

spring of 1881 he built a house on Lot 7 and *and* moved into
122 it in June of that year and he has made it his home since; that he received a warrantee deed from the N. P. R. R. Company to Lots 3-6-11-14 Aug. 4, 1887; that he dissolved partnership with his brother in 1885 in a general business embracing saw mill, store, etc., that in the settlement Wm. took a relinquishment from John of his right to Lots 2-7-10-15 and received a warrantee deed from the Company to said Lots July 30, 1887, he having paid to said Company the sum of $1249.28 for said 8 lots; that he has always been recognized as the lawful owner of said land by his neighbors with one or two exceptions until it was learned that the Indemnity land of the N. P. R. R. Co. was in dispute; the evidence further shows that Jacob Slaght the applicant under the homestead law herein applide to said Powers to rent Powers' house on one of said lots in March 1883 or 4; that they agreed upon a monthly rental of two dollars per month to be paid to said Powers for said house as rent; that said Slaght did in more ways than one pay to said Powers or th-ough some one else to him said rent for several months; that he suddenly learned that said land could be claimed as government land after the promulgation of the Guilford Miller decision and without paying rent any further offered his application for Lots 10-11-14-15 Sec. 1, Tp. 16 N. R. 45 E., showing that he has resided thereon.

The N. P. R. R. Company set up a claim to said land under its withdrawal and selection as Indemnity.

Said land appears to be now covered in part by the Town of Palouse City; That there are streets laid out thereon and houses built thereon, that the parties who laid out said town based their right upon the title acquired as they believed from the said N. P. R. R. Co.

The first point that presents itself in this case seems to be the question as to whether said land passed to the railroad Company
123 under its grant as Indemnity or whether it is *now* government land subject to entry.

The second point is, which of the parties interested herein as settlers and claimants is entitled to said land?

We find that said land was excepted from the operation of the maps of definite location of Oct. 4, 1880 and from the operation of the selection by said Company Dec. 17, 1883 by the settlement of W. L. Powers. Said settlement has been continuous since 1878 to the present and for this reason under the Guildorf Miller decision (7 L. D. page 100) the land must be held as government land at this date.

As to the second point it is clearly shown by the testimony that Slaght settled on said land as the tenant of Powers; that he occupied a house on the land owned by Powers. By this occupation of the premises he could gain no rights as against his landlord for it is a well settled principle of law which has always been recognized by the land Department that a tenant can not dispute his landlord's title.

We are of the opinion that this land should be held as government land subject to right of said Powers to purchase said land, from the government under the 5th section of the Act of March 3, 1887

or the act of January 13, 1881, as it appears said Powers holds a warrantee deed from the said N. P. R. R. Co. to said land.

R. GUICHARD, *Register.*
DAVID J. WILCOX, *Receiver.*

June 5, 1889.

X.

That thereafter the said Northern Pacific Railroad Company appealed from said decision to the Commissioner of the General Land Office and the said Jacob Slaght also appealed from that part of said decision adverse to him, and on the 13th day of April, 1895,
124 said Commissioner made and entered his decision in said contest in the words and figures set forth in plaintiff's reply herein.

XI.

That thereafter the said defendant Northern Pacific Railroad Company appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and that thereafter said Secretary of the Interior on the 20th day of May, 1896, made and entered his decision in the words and figures following, to-wit:

Vol. 22, No. 948.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 20, 1896.

NORTHERN PACIFIC R. R. Co.
vs.
JACOB SLAGHT.

Cancellation of Selection. Decision of April 13, 1895, Affirmed.

The Commissioner of the General Land Office.

SIR: The Northern Pacific Railroad Company appealed from your office decision of April 13, 1895, cancelling their selection of Lots 10, 11, 14 and 15 Sec. 1, Tp. 16, N. R. 45 E. Walla Walla land district, Washington.

The facts are sufficiently stated in your said office decision, and having considered the evidence and the assignments of error I find no cause for reversing or modifying said decision and the same is accordingly affirmed.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

125 And on the 20th day of April, 1897, there was made, executed and delivered to Jacob Slaght letters patent under the great seal of the United States, describing therein said Lots 10, 11, 14 and 15, Section 1, Township 16 North, of Range 45 East of the Willamette Meridian, which letters patent is in words and figures following, to-wit:

THE UNITED STATES OF AMERICA:

Homestead Certificate No. 2679. Application 5767.

To all to whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land Office of The United States, a certificate of the Register of the Land Office at Walla Walla, Washington, whereby it appears that, pursuant to the act of Congress approved 20th of May, 1862, "To Secure Homesteads to Actual Settlers of the Public Domain," and the Acts supplemental thereto, the claim of Jacob Slaght has been established and duly consummated in conformity to law for the Lots numbered Ten, Eleven, Fourteen and Fifteen, Section One, Township Sixteen North of Range Forty-five, East of the Willamette Meridian, in Washington, containing one hundred and sixty acres, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General.

Now Know Ye, That there is therefore granted by the United States unto the said Jacob Slaght the tract of land above described.

To Have and to Hold the said tract of land with the appurtenances thereof unto the said Jacob Slaght, and to his heirs and assigns forever subject to any vested and accrued water right for mining, agricultural, manufacturing or other purposes, and the rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs,
126 laws, and decisions of Courts and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to perpetrate or intersect the premises hereby granted as provided by law.

In testimony, I, William McKinley, President of the United States, have caused these letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, on the fourteenth day of April, in the year of our Lord, One thousand eight hundred and ninety seven, and of the independence of the United States the one hundred and twenty-first.

By the President,

WILLIAM McKINLEY,
By M. McKEAN, *Secretary.*

Recorded Col. 6A, Page 248.
[SEAL.]

Received and recorded the 4th day of May, 1897 at 8:50 o'clock A M. at the request of Jacob Slaght.

JOHN TOBIN,
County Auditor.

XII.

That said Spokane and Palouse Railway Company constructed and completed a railroad upon, over and across said government lots ten and eleven during the year of 1886 and the first half of the

year 1887, and that prior to the construction of said railroad survey of said road had been made and staked out over and across said premises, and the road so constructed conformed to the survey so made and staked out as aforesaid, and from and after the completion of said railroad it was operated daily and continuously in the carrying of freight, passengers and United States mail, and
127 that Exhibit A attached to the answers herein shows the line of said road as staked out, located, constructed and operated as aforesaid.

XIII.

That in the construction of said railroad which runs from Spokane, Washington, to Lewiston, Idaho, said Spokane and Palouse Railway Company expended a large sum of money, and was at a great expense in so doing.

XIV.

That at the time of the construction of said railroad, the plaintiff resided upon said land, and in a house located at a point within fifteen feet of the rails of the main line, and at a point about 50 feet west of government lots nine and ten in said section one, and by observation knew that the said road was being constructed, and that large sums of money were being expended and paid out, on account of said road, and that said railroad was being constructed for carrying freight and passengers thereon and thereover, and knew that the Spokane and Palouse Railway Company then and thereafter claimed a right of way one hundred (100) feet wide on either side of said main line, and knew of the making and marking of the survey so made as aforesaid.

XV.

That at the time when the surveyors first entered upon said land for the purpose of surveying and locating said railroad, the plaintiff published in the Palouse News, a weekly newspaper printed and published at Palouse City, Washington, a notice as follows: "Notice is hereby given to all persons whomsoever not to trespass on my homestead claim which is: Lots 10, 11, 14 and 15, Sec. 1. Tp. 16, N. R. 45 E. W. M., Whitman County, W. T. (Signed) Jacob Slaght," which was the only notice or formal objection which the plaintiff made to the construction of said railroad.

128 XVI.

That in August, 1887, the said Northern Pacific Railroad Company, claiming to be the owner of said lots 10 and 11, sold and conveyed the same deed of conveyance, containing the usual covenants and warranties, to William L. Powers, and that afterwards, on the 14th day of September, 1887, the said William L. Powers and wife conveyed by deed of conveyance to the Spokane and Palouse Railway Company a tract of land for a right of way 200 feet wide, being the land shown and marked in defendant's Exhibit A in their an-

swer, as the tract occupied by the defendant Northern Pacific Railway Company, as its right of way.

XVII.

That on the 12th day of May, 1897, said Spokane and Palouse Railway Company, W. L. Powers, Hattie Dean, Edward Dean, F. S. Bell, Ivan Chase, J. K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Land Company, a corporation, Palouse Mill Company, a corporation, and A. F. Pugh, who were the grantees of the said William L. Powers, filed in the Superior Court of Whitman County, Washington, their complaint against the said Jacob Slaght, for the purpose of having the said Jacob Slaght declared a trustee and as holding said land in trust for the plaintiff and directing a conveyance from him to the plaintiffs and enjoining the said Jacob Slaght from bringing any action to oust the defendants, and subsequently they filed a second amended complaint, which amended complaint and prayer are fully set forth in plaintiff's reply herein.

XVIII.

That the said Jacob Slaght demurred to said amended complaint, and said demurrer was by the court sustained, the order containing said demurrer being set out in plaintiff's reply herein.

129 XIX.

That thereafter and on to-wit the 24th day of June, 1898, the plaintiffs in said action, appealed from said order and final judgment sustaining the said demurrer to the complaint, to the Supreme Court of the State of Washington, and that thereafter on the 14th day of January, 1899, the Supreme Court of the State of Washington made and entered its judgment in said cause in the words and figures set out in plaintiff's reply herein.

XX.

That thereafter the said plaintiffs took said cause to the Supreme Court of the United States on a writ of error, and the said Supreme Court of the United States having considered the same, on the 14th day of January, 1899, affirmed the said judgment of the said Supreme Court of the State of Washington, as aforesaid.

XXI.

That after the said Jacob Slaght and Margaret A. Slaght were divorced as aforesaid, and on to-wit the 27th day of July, 1901, the said Margaret A. Slaght executed and delivered a warranty deed in the usual form to said Jacob Slaght, in which deed the land described in plaintiff's complaint was included, set out and described therein and stated that the property described in said deed was to be his separate and sole property, and the said Margaret A. Slaght did not, nor did the said Jacob Slaght, make any transfer or conveyance of any kind, of any portion of said government lots 10 and

11 except as aforesaid, prior to the 23rd day of February, 1901, unless the facts herein stated and stipulated constitute a transfer or conveyance.

XXII.

That on the 21st day of February, 1899, the Spokane and Palouse Railway Company, conveyed all of its right, title, interest
130 and estate in and to the right of way over and across lots 10 and 11, section 1, as aforesaid, together with all its property to the defendant Northern Pacific Railway Company, and that ever since then the said Northern Pacific Railway Company has maintained and operated said road in the carrying of freight, passengers and United States mail from Spokane, Washington, to Lewiston, Idaho, and intervening points.

XXIII.

That on the 21st day of February, 1899, when the said Spokane & Palouse Railway Company transferred and conveyed its interest in and to the right of way over and across lots 10 and 11 as aforesaid, to the defendant, the Northern Pacific Railway Company, the said Spokane and Palouse Railway Company had not, nor had the Northern Pacific Railway Company acquired from plaintiff by deed, grant or conveyance, of any kind, unless the facts herein stipulated amount thereto, nor had the Spokane & Palouse Railway Company nor the Northern Pacific Railway Company acquired by condemnation proceedings against plaintiff, any right over and across said land, and the said defendant Northern Pacific Railway Company has not since said date received from plaintiff any deed, grant or conveyance of any kind, other than the facts herein show-, nor has it acquired any right to the lands described in the complaint by condemnation proceedings against plaintiff for right of way over and across said land.

XXIV.

That the plaintiff was not asked for nor did he give his consent (unless the facts herein stipulated show such consent) to the location construction or erection of said railroad over and across said lots at the place where the same was located, or at any other place, over and across said lots, nor did the plaintiff make any formal
131 protest or objection to the construction of said road, other than said notice contained in said notice published in the paper as aforesaid and in the proceedings in the United States Land Office, and in the State and Federal Courts as herein set forth.

XXV.

That without any objection on the part of plaintiff (other than the publication of said notice) there has been constructed upon said right of way on the premises in controversy valuable and lasting improvements in the shape of railroad bridges, water tank and warehouses, which would be practically of no value should the road

and right of way of defendant Northern Pacific Railway Company be changed from the premises in controversy.

That it would be a great expense to defendant, the Northern Pacific Railway Company, to change its line of road and right of way over the premises in controversy, and that some of the improvements of said road consisting of bridges and water tank and embankments would be of no practical value, should the road or right of way be changed from the premises in controversy.

XXVI.

That the defendant, Northern Pacific Railway Company, does not claim any part or portion of lots 10 and 11, section 1, as aforesaid, except a strip 200 feet wide, being 100 feet on each side of the center of the said road over and across said lots, as the same is now constructed, shown and designated on the plat marked Exhibit A, and attached to the answer herein.

XXVII.

That the defendants John Miller and Anna Miller, his wife, and the Washington Grain Milling Company, a corporation, are the owners of and operating warehouses situated, designated and located in said plat marked Exhibit A of defendants' answer, said
132 warehouses having been constructed and erected on said land under a grant or lease of premises from the said Northern Pacific Railway Company, or its grantor, the Spokane and Palouse Railway Company, but without permission of the plaintiff herein (unless the facts herein stipulated show such consent).

XXVIII.

That the builders of said warehouses knew, and the Spokane & Palouse Railway Company knew, or could have known had they made inquiry, that the question of the title to said land, and that portion thereof claimed by the said Northern Pacific Railway Company, was in controversy in the land Department of the United States undecided and undetermined as in the manner and at the time and dates hereinbefore set forth.

XXIX.

That the said warehouse now occupied by John A. Miller was partially built in 1892 by C. H. Farnsworth and J. T. Waters, and prior to the construction thereof the plaintiff notified the said Farnsworth and Waters not to construct said warehouse on said land; and also stated to them that said land belonged to plaintiff, and the right thereto was in contest and pending in the United States Land Office undetermined. That said Miller has built additions to said warehouse.

XXX.

That during the time that all of said warehouses were being constructed the plaintiff was residing upon said government lots 10 and

11, section I, as aforesaid, and on that portion thereof as set forth in paragraph XIV now claimed by the defendant Northern Pacific Railway Company as its right of way.

XXXI.

That no suit or action was brought by plaintiff to prevent or restrain the erection, construction, or maintenance on the prem-
133 ises in controvesy of the said railroad or any of said warehouses, nor to procure the possession thereof or damages for the retention of the same, prior to the commencement of this action, and that this action was commenced within a few months and as soon as practicable after the decision of the Supreme Court of the United States affirming the decision of the Supreme Court of the State of Washington.

XXXII.

That said township sixteen north, of range forty-five east, was surveyed by the United States in the year 1874 and a plat thereof duly approved was filed in the District land office at Walla Walla Washington Territory, on the 2nd day of April, in the year 1875, and said government lots 10, 11, 14 and 15 were at the date of filing said plat and survey, and thereafter remained, except for the claims of said Jacob Slaght and the Spokane & Palouse Railway Company, public lands of the United States not reserved.

XXXIII.

That the defendants herein other than the Northern Pacific Railway Company are tenants of said railway company, and have and hold possession of portions of the premises described in the complaint only as such lessees for a short period of time, and as warehousemen and have warehouses erected on the parts thereof leased to them, and they receive and accept as warehousemen all grain tendered to them to the extent of their capacity, for shipment over the line of the Northern Pacific Railway Company.

XXXIV.

That it would be possible for the defendant Northern Pacific Railway Company to carry freight, passengers and U. S. Mail from Spokane, to and from Lewiston, Idaho, through Palouse, Washington, on or over a right of way across plaintiff's land, not exceeding
25 feet wide and a space 100 feet square would permit the
134 erection of a depot at Palouse, but great inconveninence would result to the citizens of Palouse and vicinity and to the said railway company if this were all the facilities had by said railway company for receiving and delivering freight and passengers and U. S. mail; that for the convenience, prompt and expeditious receipt and delivery and shipment and handling of freight and for the erection of ware houses and elevators for the storing of freight and wheat at Palouse, Washington, it is necessary to have in addition to the main track, depot, switches, turnouts, warehouses, wate

tanks, elevators, and other structures which require a right of way a space as large as that claimed by the defendant railway company as shown by the Exhibit attached to its answer, that is, the whole of the premises in controversy in this action.

XXXV.

That said town of Palouse is a thriving municipal corporation of the third class, and was organized and incorporated under the laws of the State of Washington, on the 17th day of June, 1889, and the territory included in the limits thereof, at the date of its organization was the following, to-wit:—

Commencing at the Northeast corner of Lot Three (3) in Section Six (6) in Township Sixteen (16), North of Range Forty-six (46), East of the Willamette Meridian, in Whitman County, State of Washington, running thence West along the township line one (1) mile to the center line of Section One (1) in said township Sixteen (16), North of Range Forty-five, East of the Willamette Meridian, running thence south along the center line of Section One (1) aforesaid 285 rods, thence running due east parallel with the north boundary line thereof one (1) mile to a point on the east line of southeast Quarter (SE ¼) of Northwest Quarter (NW ¼) of the said section six (6) aforesaid, running thence north parallel with
135 the west boundary line thereof to the North Palouse River, thence easterly up said river to a point in said river where the east line of Winfield Street in Fisher's Addition to Palouse City, Washington, as shown upon the recorded plat thereof now of record in the auditor's office of Whitman County, Washington, *produced* south will cross said river being about 690 feet east of the east line of said Lot Three (3) in Section Six (6) aforesaid, running thence north to the center line of Idaho Avenue in said Fisher's Addition aforesaid, running thence west along the center line of Idaho Avenue to the east line of Lot Three (3) in Section Six (6) in said Township Sixteen (16) aforesaid, and thence running north to the township line the place of beginning lying, situate and being in section One (1) in Township Sixteen (16) and Range Forty-five (45) E. W. M. aforesaid, and in Section Six (6) Township Sixteen (16) Range Forty-six (46), E. W. M. aforesaid.

XXXVI.

That the land involved in this action is much greater in value now than it was in 1886 or 1887. That said railway company increased the value thereof to some extent, and there has been a general rise in values of all lands in the vicinity of the land involved in this action.

XXXVII.

This stipulation is not intended to and shall not prevent any party to this action from producing, offering or introducing, upon the hearing and trial of this cause any testimony or evidence, he, it or they, may desire to produce, offer or introduce, providing that the party desiring to produce, offer or introduce such additional testi-

mony or evidence shall notify the opposite attorney of their intentions, and the point on which such testimony or evidence is to be offered, at least ten days prior to the time when said cause is
136 set for hearing, nor shall this stipulation prevent the court from hearing, or receiving any evidence that the said court may deem proper or admissible as to any matter or thing not covered hereby, provided that the opposite party has reasonable notice of the requirement of the court in that particular and time to prepare to meet it by testimony.

XXXVIII.

This stipulation shall not preclude or estop either party hereto from excepting to any finding of fact by the trial court founded on any fact or facts herein agreed to which are irrelevant or immaterial, and either party may except to any finding of fact found by the trial court on the ground that such finding is irrelevant and immaterial, although based upon such fact or facts herein agreed to.

XXXIX.

On the 3rd day of December, 1901, the county commissioners of Whitman County, Washington, by an order entered upon their records and delivered to the county treasurer ordered that all taxes levied and assessed against said government lots 10 and 11, section one, aforesaid, for the year 1896 and all prior years be cancelled and the same were by said treasurer cancelled upon the tax rolls of said county, and on the 4th day of August, 1902, said board of county commissioners of Whitman County made and entered an order on their records cancelling all the taxes for the year 1897-8-9 1900 and 1901 levied and assessed against lots and blocks in Powers Addition to Palouse contained within said government Lots 10 and 11 aforesaid, and for said years of 1897-8-9-1900 and 1901, said government lots 10 and 11 have been assessed to Jacob Slaght and Margaret A. Slaght and to their respective grantees without deduction therefor for said right of way. That the defendant Northern Pacific
137 Railway Company and its grantor Spokane & Palouse Railway Company during all of said years and ever since the year 1886 were and have been assessed for state and county taxes on its said road in Whitman County, at the uniform rate of a certain sum per mile for main tracks, and — certain sum per mile for side tracks which include the right of way owned or claimed by said company in said county.

It is hereby stipulated that a jury trial be and it is hereby waived. It is further stipulated that this action shall be tried to, by and before the court without a jury.

THOMAS NEILL &
A. A. WILSON,
Attorneys for Plaintiff.
STEPHENS & BUNN,
Attorneys for Defendant.

Endorsed: Filed October 5th 1903. W. O. McCaw, Clerk.

138 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Comes now Thomas Neill, attorney for the plaintiff in the above entitled case, and moves the Court that a re-argument be permitted herein on the question whether or not the residence of the plaintiff on the land prior to the location of the Railroad Company, and prior to the filing by the plaintiff on the land was such a possessory right as to require condemnation proceedings on the part of the Railroad Company to secure its right of way over and across the land in controversy under act of March 1875.

Respectfully submitted,

THOMAS NEILL,
Attorney for Plaintiff.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 18 day of October 1904. Journal —. Page —. Book of —. Page —. W. O. McCaw, County Clerk.

139 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Motion.

Comes now the plaintiff and moves the Court as follows,

1st. Moves the Court for leave to introduce testimony to show that Jacob Slaght appeared before the District Land Office of the United States, at Colfax, Washington, in July 1883, and offered to file on Government Lots 10, 11, 14 and 15, Section 1, Township 16 North of Range 45, E. W. M. and offered and tendered the filing fee therefor, and that said filing was refused, and that thereupon said land officers informed the said Jacob Slaght, that they would notify him when they were permitted to accept filing on said land.

2nd. Renews the motion heretofore made for permission to reargue this case on the point that the plaintiff had such an interest or right in the land in controversy as shown by the facts agreed to in this cause to prevent any right attaching thereto in the Spokane & Palouse Railway Company by filing its map or by construction of its road over and across said land under the act of March 3, 1875.

3rd. That if either or both of said motions be granted that the Court fix a time for hearing, and if the first motion is granted that the time set shall be such as to give the parties at least ten days' notice of such hearing.

140 This motion is based upon the affidavit of Thomas Neill hereto attached and the 34th paragraph of the stipulation herein.

Respectfully,

W. E. McCROSKEY,
Attorneys for Plaintiff.

In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

STATE OF WASHINGTON, *County of Whitman, ss:*

Thomas Neill being first duly sworn says that he is one of the attorneys for plaintiff in the above entitled action.

That Jacob Slaght has been in Idaho in the Mining districts, and that affiant has not seen him or conversed with him, or had any communication with him since before the submission of this case until the 18th day of February, 1904.

That on said 18th day of February 1904 the said Jacob Slaght was in Colfax, and that affiant then learned from the said Jacob Slaght for the first time, that on or about the 8th day of

141 July, 1883, he came to Colfax for the purpose of and with the intention of filing on Government Lots 10, 11, 14 and 15, Section 1, Township 16, North of Range 45 East of the Willamette Meridian, Whitman County, Washington, and there appeared before the Register and Receiver of the United States Land Office then located at Colfax, and offered a homestead filing on said land.

That said officers thereupon informed him that they were not permitted to accept filing on said land. That the said Jacob Slaght offered to leave with them the filing fees required by law, and said officers refused to accept the same, and thereupon stated to said Jacob Slaght that as soon as they were permitted to accept filing on said land, that they would notify the said Jacob Slaght of that fact.

THOMAS NEILL.

Subscribed and sworn to before me this 19th day of February, 1904.

JOHN PATTISON,
[SEAL.] *Notary Public for Washington, Residing at Colfax, Therein.*

Endorsed: Filed in the office of the Clerk of the Superior Court, this 9 day of March 1904. Journal —. Page —. Execution Docket —. W. O. McCaw, County Clerk.

142 In the Superior Court of the State of Washington in and for the County of Whitman.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, his Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Order.

The application and motion of the plaintiff to re-open the case and produce and introduce new and additional evidence and to re-argue the above entitled case coming on regularly to be heard, by the Court, plaintiff and defendants appearing by their respective counsel, the Court after hearing the arguments of counsel and being fully advised in the premises denies and overrules said motion as to the introduction of new and additional evidence, and sustains and grants said motion to re-argue said case.

It is therefore ordered that said motion and application be, and the same are hereby overruled as to the introduction of new and additional evidence, and that it is hereby sustained and granted as to the re-argument of the cause, which re-argument is set for this 20th day of April, 1904.

Exceptions are hereby granted to plaintiff and defendants as their interests are adversely affected.

Done in open court this 20th day of April, 1904.

CHESTER F. MILLER, *Judge.*

Endorsed: Filed in the office of the Clerk of the Superior Court, this 21 day of April 1904. Journal —, Page —, Execution Docket —. W. O. McCaw, County Clerk.

143 In the Superior Court of the State of Washington for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, his Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

(*Findings of Fact and Conclusions of Law.*)

This cause coming on to be heard before the Court, a jury having been waived, the plaintiff appearing by Thomas Neill and W. E. McCrosky his attorneys, and the defendants appearing separately by Stephens & Bunn and James B. Kerr, their attorneys, and the Court having heard the testimony and argument of counsel, and having taken the matter under advisement, and being fully advised in the premises, finds the following facts.

I.

That the Spokane & Palouse Railway Company, was at all the times mentioned in the pleadings herein, and still is, a corporation organized under the laws of the Territory of Washington, and authorized to construct, maintain and operate a line of Railroad from Spokane Washington to Lewiston Idaho, over and across any lands through which it has secured a right of way according to law.

II.

That on the 21st day of February 1899, the defendant Northern Pacific Railway Company was, ever since has been, and now is a corporation organized under the laws of the State of Wisconsin.

III.

That the defendant the Washington Grain and Milling
144 Company was and still is a corporation duly organized under the laws of the State of Washington.

IV.

That during all the times mentioned in the pleadings the defendants John A. Miller and Anna Miller were and still are husband and wife.

V.

That plaintiff and Margaret A. Slaght were prior to the year 1883 husband and wife, and said relation continued until the 1st day of August 1898, at which time by a decree of the Superior Court of Whitman County, State of Washington, they were divorced.

VI.

That on or about the first day of March 1883, the said plaintiff and Margaret A. Slaght, as husband and wife, settled upon and established actual residence on Government Lots 10, 11, 14 and 15, Section One, Township Sixteen, North of Range Forty Five East of the Willamette Meridian, Whitman County, Washington, with intent to claim the same under the homestead laws of the United States, and continued to reside thereon until after the — day of — 1897.

VII.

That from the 30th day of November 1880 to August 15th 1887, said Government Lots 10, 11, 14 and 15, Section One, Township Sixteen North Range Forty Five East of the Willamette Meridian, Whitman County, Washington, were public lands of the United States, but by an order of the Secretary of the Interior, was, during all of said time, withdrawn from settlement under the homestead and pre-emption laws of the United States, being reserved as indemnity lands for the Northern Pacific Railroad Company under its grant of 1864.

VIII.

That on the 26th day of May 1883, the Secretary of the Interior issued an order to the Register and Receiver of the local land
145 office of the United States, for the district in which said lands were situated, directing them to refuse applications to enter said lands under any of the laws of the United States, pertaining to the disposal of the public domain.

IX.

That said order remained in force until the 15th day of August, 1887, when the Secretary of the Interior revoked said withdrawal order and opened said lands to Homestead entry, after notice thereof should be given for thirty days, and said lands were open for entry in the local land office of the United States, for the district in which said lands were situate, after said thirty days' notice had been given.

X.

That on the 31st day of October 1887, said plaintiff presented, on behalf of himself and said wife, Margaret A. Slaght, an application to said land office of the United States for the District in which said land was situated, to enter said Lots 10, 11, 14 and 15, Section One, Township Sixteen, North of Range Forty Five East of the Willamette Meridian, Whitman County, Washington, under the homestead laws of the United States, and in said application alleged settlement on said land from March 4th 1883, and that the same had been continuous, and that he had built a house on said land and improved the same.

XI.

That notice of the said application by the said Jacob Slaght to file on said land, was given to the said Northern Pacific Railroad Company by the Register and Receiver of the local land office of the United States for the district in which said lands were situate, as required by the order of the Secretary of the Interior, revoking said withdrawal order as aforesaid, and said Company thereupon filed its objections to the acceptance of said application, and a hearing
146 was ordered thereon for the purpose of determining the rights of the Northern Pacific Railroad Company and of the said Jacob Slaght in and to said described land, and after the hearing was ordered one William L. Powers intervened, and the hearing was had in the local office, and the local officers rendered a decision in words and figures following to-wit:

"THE N. P. R. R. Co.
vs.
JACOB SLAGHT, with WILLIAM L. POWERS as Intervenor.

Involving Rights to Lots 10, 11, 14, 15, Sec. 1, 16, 45.

On October 31 1887 Jacob Slaght made homestead application for Lots 10, 11, 14, 15, Sec. 1, Tp. 16 N. R. 45, E. alleging settlement on said land March 4, 1883.

Nov. 7, 1887 the N. P. R. R. Co. was notified of said application, they having selected said land as indemnity Dec. 17, 1883.

Dec. 6, 1887 said company filed objections to said application.

Dec. 20, 1888 the Register and Receiver of this office issued notices in said case ordering a hearing between the parties interested for Feb. 20, 1889 before W. N. Ruley Judge of Probate at Colfax, W. T.

On said Feb. 20, 1889 all parties interested appeared including one W. L. Powers who by his testimony appears to claim said land by prior settlement and residence under Act January 13, 1881, commonly called in this country the "Brents Act" if said land is declared to be government land.

From the testimony we find that in 1877 one A. M. Duffield first settled upon and claimed this land including Lots 2, 7, 3 and 6 which together with Lots 10, 11, 14 and 15 made 8 lots; that he shortly afterwards sold his possessory rights and improvements to said land to one L. M. Rhodes on his notes for $650; that when notes became due he could not pay them and relinquished rights to W. L. Powers, who took up and paid said notes in 1878, settled on
147 the land and offered to purchase Lots 2, 7, 10 and 15 from the N. P. R. R. Company, for whose benefit said land had been withdrawn from public settlement and which was being offered for sale by said company. At the same time Powers' brother John G. Powers applied to said Company to buy lots 3, 6, 11, 14; that at this time said land was recognized as railroad land; that Wm. L. Powers built a log cabin on lot 10 in winter of 1878; that in 1879 he plowed and put in grain 6 acres of said lot and continued to cultivate said land; that in 1885 he cleared lot 10 entirely and part of lot 11; that he afterwards raised two crops thereon; that in 1887 the Spokane & Palouse Railroad run through lot 11 and put a stop to the cultivation of said lot; that in spring of 1881 he built a house on lot 7 and moved into it in June of that year, and has made it his home since; that he received a warrantee deed from the N. P. R. R. Company to lots 3, 6, 11, 14 Aug. 4, 1887; that he dissolved partnership with his brother in 1885 in a general business embracing saw mill, store, etc.; that in the settlement Wm. took a relinquishment from John of his right to lots 2, 7, 10, 15, and received warrantee deed from the company to said lots July 30, 1887, he having paid to said Company the sum of $1249.28 for said 8 lots; that he has always been recognized as the lawful owner of said lots by his neighbors with one or two exceptions until it was learned that the Indemnity land of the N. P. R. R. Co., was in dispute; the evidence

further shows that Jacob Slaght, the applicant, under the homestead law herein applied to said Powers to rent Powers' house on one of said lots in March 1883 of '4; that they agreed upon a monthly rental of two dollars per month to be paid to said Powers for said house as rent; that said Slaght did in more ways than one pay to said Powers or through some one else to him said rent for several months; that he suddenly learned that said land could be claimed as
148 government land after the promulgation of the Guilford Miller decision and without paying rent any further offered his application for lots 10, 11, 14, 15, Sec. 1, Tp. 16, N. R. 45 E. showing that he had resided thereon.

The N. P. R. R. Company set up a claim to said land under its withdrawal and selection as indemnity. Said land appears to be now covered in part by the Town of Palouse City; that there are streets laid out thereon and houses built thereon; that the parties who laid out said town based there right upon the title acquired as they believed from the said N. P. R. R. Co.

The first point that presents itself in this case seems to be the question as to whether said land passed to the railroad Company under its grant as indemnity or whether it is *now* government land subject to entry. The second point is which of the parties interested herein as settlers and claimants is entitled to said land.

We find that said land was excepted from the operation of the map of definite location of Oct. 4 1880, and from the operation of the selection by said Company Dec. 17, 1887, by the settlement of W. L. Powers.

Said settlement has been continuous since 1878 to the present and for this reason, under the Guilford Miller decision (7 L. D. page 100) the land must be held as government land at this date. As to the second point it is clearly shown by the testimony that Slaght settled on this land as the tenant of Powers; that he occupied a house on the land owned by Powers. By this occupation of the premises he could gain no rights as against his landlord, for it is a well settled principle of law which has always been recognized by the land department that a tenant can not dispute his landlord's title.

We are of the opinion that this land should be held as
149 government land subject to the right of said Powers to purchase said land from the government under the 5th section of the act of March 3, 1887, or the act of January 13, 1881, as it appears said Powers holds a warrantee deed from the said N. P. R. R. Co., to said land.

R. GUICHARD, *Register.*
DAVID J. WILCOX, *Receiver.*

June 5, 1889."

XII.

That thereupon the said Northern Pacific Railroad Company appealed from said decision to the Commissioner of the General Land Office and the said Jacob Slaght also appealed from that part of said decision adverse to him, and on the 13th day of April 1895 said

Commissioner made and entered his decision in said contest in the words and figures following to wit:

"F. 1889-36427.

8-7088.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 13, 1895.

JACOB SLAGHT
vs.
NORTHERN PACIFIC R. R. Co. and WILLIAM L. POWERS.

Involving Homestead Application for Lots 10, 11, 14 & 15, Sec. 1, T. 16 N., R. 45 E.

Register & Receiver, Walla Walla, Washington.

SIRS: I have considered the contest of Jacob Slaght *vs.* Northern Pacific Railroad Company and William L. Powers, intervenor, involving lots 10, 11, 14, 15 Sec. 1, T. 16, N. R. 45 East, the record of which was transmitted with your letter of July 10, 1889, on appeal by Jacob Slaght and said Railroad company from your decision in favor of William L. Powers, intervenor.

150 The land is in the limits of the withdrawal upon the line of the amended general route of said road, the map showing which was filed Feb. 21, 1872, and upon the definite location of the road it fell within the indemnity limits, the order for the withdrawal — which was received at the local office November 30, 1880. These withdrawals have been held by the department to be without authority of law and of no effect. (17 L. D. 8, and 18 L. D. 87). On December 17 1883 the Company selected the land in question under act of July 2, 1864 (13 Stat. 356) per list No. 1, and on the same day said company selected the land under acts of July 2, 1864 (13 Stat. 356) and May 31, 1870 (16 Stat. 376) for indemnity purposes per amendatory list No. 2. On October 31, 1887 Jacob Slaght presented an application to make homestead for this land and alleged that he settled and established his actual residence thereon March 4th 1883 and the same has been continuous; that he built a house 12 x 14 feet, a kitchen 10 x 12 feet, a stable, dug a cellar, and broke a garden spot and built a half *mile* fence and that his improvements are worth about $275.00.

The Company was duly notified of said application and filed its objections against the acceptance of the same Dec. 2, 1887.

Upon the issuance of notice to the parties in interest a hearing in the case was had and concluded April 4th. 1889, at which all parties were represented.

The testimony adduced at the hearing on behalf of Slaght shows that he established his actual residence on the land in March 1883; that he broke and planted a garden, that in a few days after moving

in the log house on the land he built and addition thereto, that in September 1883 he built a house 12 x 14 feet, a kitchen, a stable, a chicken house, dug a cellar and fenced about 80 acres; that his residence on the above described tracts of land has been continuous since March 1, 1883, and that his improvements are worth
151 about $400.00 and *the* he is a qualified settler.

The testimony adduced at the hearing on behalf of the defendants is to the effect that William L. Powers has resided in Palouse City, Whitman Co., Washington, and on Section 1, T. 16, N. R. 45 E. for thirteen years; that prior to Slaght's residence on the land in question, a part of it was claimed by John D. Powers, a brother of the intervenor; that Slaght went into possession of the land by renting it from William L. Powers; that Slaght established himself on the land in 1883, and is still residing thereon; that a portion of this land has been platted as an addition to the town of Palouse City, previous to which Slaght had lived on the land for two years; that Slaght's residence is on lot 10 and when he first settled on the place he paid a small rental to William L. Powers, that the intervenor has resided upon lot 7, T. 16, N. R. 45 E. since 1881; that he intended to get title to the land involved in this case from the Northern Pacific Railroad Company under its grant of July 2, 1864 (*supra*). That William L. Powers has exhausted all his rights under the public land laws except his timber culture right; that in 1877 A. M. Duffield settled upon and laid claim to lots 2, 3, 6, 7, 10, 11, 14, 15 Sec. 1, T. 16, N. R. 45 E. who shortly thereafter sold his possessory right and improvements to L. N. Rhodes, taking his (Rhodes') notes for $650, who could not meet the notes and accordingly relinquished his rights to William L. Powers who offered to purchase Lots 2, 7, 10 and 14 from said railroad company, and at the same time John G. Powers, a brother of William L. Powers, offered to purchase lots 3, 6, 11 and 15 from said company; that William L. Powers built a log cabin on lot 10 in 1879, plowed and planted about six acres to grain and continued to cultivate it; that in 1885 he cleared lot 10 and part of lot 11, and raised two crops thereon, that in the spring of 1881 he
152 built a house on Lot 7 and moved into it in June 1881, and has made it his home ever since; that on September 1, 1879 said railroad company mortgaged lots 2, 7, 10, 15, 3, 6, 11 and 14 Sec. 1, T. 16, N. R. 45 E. to the Farmers Loan & Trust Company of New York City; on July 13, 1887, lots 2, 7, 10 and 15 were bargained, sold and deeded to William L. Powers, and on August 4, 1887, lots 3, 6, 11 and 14 were bargained, sold and deeded to William L. Powers, and in the settlement William L. Powers took a relinquishment from John G. Powers of all his rights to lots 2, 7, 10 and 15, he (William L. Powers) paid said Railroad Company $1249.23 for said eight lots. You hold that the land in question is excepted from the operation of the Company's selection by reason of the settlement of the said William L. Powers and that the same should be held as public land and subject to his right to purchase under Section 5 of the act of March 3, 1887 (24 Stat. 556) or act

of January 13, 1881 (21 Stat. 315) and that Slaght settled on the land as the tenant of Powers.

The basis of your decision is not well founded:

1st. For the reason that Powers did not apply to purchase the land prior to the passage of the act of March 3, 1887 (*supra*).

2nd. Because no act to purchase under said act of January 13, 1881, (*supra*) has been made within the prescribed time; that he was not qualified to purchase under said act; not having exhausted his timber culture right, and besides such application to purchase shall not cover more than 160 acres, and again it appears as an afterthought, to secure this land under the latter named act, as the same was purchased from the railroad Company in 1887 under the grant of July 2, 1864 (*supra*).

Therefore in view of this showing, your decision in favor of William L. Powers, is hereby reversed, likewise your decision adverse to Jacob Slaght. Your opinion that said Company's selection as to this land was improperly allowed, and that the Company had no
153 right to the land prior to its selection and that the same was occupied and improved as the home of a settler, Slaght's, at the date of selection, that such selection as to the land in question should be cancelled in accordance with the uniform practice of the Department and I concur therein.

Accordingly amendatory list No. 2 of selection of Dec. 17, 1883, by said Company is hereby held for cancellation as to said lots 10, 11, 14 and 15 Sec. 1, Twp. 16, N. R. 45 E.

The usual time, sixty days, after notice, will be allowed the Railroad Company and William L. Powers, within which to appeal to the Honorable Secretary of the Interior.

Should this decision become final, Slaght will be permitted to make homestead entry for this land; you will advise him of this action. At the proper time you will report as to the action taken in the premises.

Messrs. Britton and Gray, the resident attorneys for said railroad company will be advised hereof by this office.

Yours Respectfully,

(Signed) S. W. LEMOREUX,
Commissioner."

XIII.

That thereafter the said Northern Pacific Railroad Company appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior thereof, and on the 20th day of May 1896 the said Secretary of the Interior made and entered his decision therein, which was — words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 20, 1896.

NORTHERN PACIFIC R. R. Co.
v.
JACOB SLAGHT.

Cancellation by Selection. Decision of April 13, 1895, Affirmed.

154 The Commissioner of the General Land Office.

SIR: The Northern Pacific Railroad Company appeals from your office decision of April 13, 1895, cancelling their selection of Lots 10, 11, 14, and 15, Sec. 1, T. 16, N. R. 45 E. Walla Walla Land District, Washington.

The facts are sufficiently stated in your office decision, and having considered the evidence and the assignments of error, I find no cause for reversing or modifying said decision and the same is accordingly affirmed.

Very Respectfully, HOKE SMITH, *Secretary.*"

XIV.

That thereafter said filing was accepted and final proof made thereunder and afterwards and on the 20th day of April 1897, there was made, executed and delivered to Jacob Slaght letters patent under the great seal of the United States for said lots 10, 11, 14 and 15 Sec. 1, Township 16, North of Range 45, East of the Willamette Meridian, Whitman County, Washington, in which letters patent no reservation of any claims or rights was made in favor of the Spokane & Palouse Railway Company or any other railroad company.

XV.

That said Spokane and Palouse Railway Company constructed and completed a railroad upon, over and across said government lots ten and eleven during the year 1886 and the first half of the year 1887, and that prior to the construction of said railroad, survey of said road had been made and staked out over and across said premises, and the said road so constructed, conformed to the survey so made and staked out as aforesaid, and from and after the completion of said railroad, it was operated daily and continuously in the carrying of freight, passengers and United States mail, and that the plat attached to defendants answer as Exhibit "A" shows
155 the line of said road as staked out, located, constructed and operated as aforesaid, and that the Spokane and Palouse Railway Company continued to so occupy the same until the 21st day of February, 1899, when it conveyed all of its right, title, interest and estate in and to the right of way over and across Lots 10 and 11 Section one aforesaid, together with all its property, to the defendant Northern Pacific Railway Company, and ever since then the Northern Pacific Railway Company has maintained and oper-

ated said road in the carrying of freights passengers and United States mail from Spokane Washington to Lewiston Idaho, and intervening points, and was in the possession and occupying said tract of land as a right of way at the commencement of this suit.

XVI.

That before the location and construction of said railroad, on the 26th day of April 1886, the said Spokane and Palouse Railway Company filed with the Secretary of the Interior of the United States a copy of its articles of incorporation and due proofs of its organization under the same and the filing of said papers was duly approved by said Secretary of the Interior on the 11th day of May 1886.

That after the location and construction of said railroad said Spokane and Palouse Railway Company filed in the United States District Land Office for the district in which said premises are situated a map or profile of its road showing in the line thereof extending over and across said Lots 10, 11, 14 and 15 of said Section One, Township Sixteen, North, Range Forty-five East, W. M., and extending from a point at Belmont Whitman County Washington Territory to a point at Genesee Idaho Territory, a distance of 72.37 miles. That said map was filed in said District Land Office on July 17th 1888 and had been duly approved by the Secretary of the Interior on the 27th day of June 1888.

156 XVII.

That at the time of the construction of said railroad the plaintiff resided upon said land in a house located at a point within fifteen feet of the rails of the main line, and at a point fifty feet West of Government Lots 9 and 10 of said Section One.

XVIII.

That in August 1887 the Northern Pacific Railroad Company claiming to be the owners of said lots 10 and 11 sold and conveyed the same by deed of conveyance to William L. Powers and that afterwards on the 14th day of September 1887 the said William L. Powers and wife by deed of conveyance, conveyed to the Spokane and Palouse Railway Company the tract of land then used by said Railway Company as a right of way, being the land shown and marked in Defendants' Exhibit "A" attached to their answer herein as the tract occupied by the defendant Northern Pacific Railway Company, as its right of way.

XIX.

That on the 12th day of May 1897 the Spokane & Palouse Railway Company, William L. Powers *et al.*, commenced a suit in the Superior Court of the State of Washington, in and for Whitman County, against the said Jacob Slaght, for the purpose of having said Slaght declared a trustee, and as holding said lots 10, 11, 14 and 15, in

trust for the plaintiff and directing a conveyance from him to the plaintiffs, and enjoining said Jacob Slaght from bringing any action to oust the plaintiffs and afterwards they filed an amended complaint which amended complaint and prayer are fully set forth in plaintiffs' reply herein, and in said complaint the said Spokane & Palouse Railway Company and its co-plaintiffs alleged among other things, that long prior to the settlement upon said land by the said Jacob Slaght, the said lands had been reserved for the use and benefit
157 of the Northern Pacific Railroad Company, and by reason of the premises the said land was subject to selection by said Northern Pacific Railroad Company, and the same was selected by said Company (which selection was approved in December 1887) and that thereupon the said Northern Pacific Railroad Company acquired the title in and to said described lands, and at the time the defendant Jacob Slaght applied to enter said land, and the date of said hearing in said contest, and at the date of the issuance of said patent, said land was not public land subject to entry under the land laws of the United States approved by act of July 1864, granting lands to the Northern Pacific Railroad Company, and said plaintiffs further asserted and alleged in said complaint, that the "plaintiffs asserted and claimed title to certain portions of said land hereinbefore described under and by virtue of certain instruments in writing duly made, executed and delivered to them by said William L. Powers and his grantees."

XX.

That said Jacob Slaght demurred to said complaint on the ground that the same did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the Court and judgment entered, and thereafter an appeal was taken by said Spokane & Palouse Railway Company, and its co-plaintiffs, to the Supreme Court of the State of Washington, which Court affirmed the judgment of the lower Court, and thereupon the said Spokane & Palouse Railway Company, and its co-plaintiffs in said action, removed the same to the Supreme Court of the United States on a writ of error, and the Supreme Court of the United States affirmed the judgment of the Supreme Court of the State of Washington.

XXI.

That afterwards the said Jacob Slaght and Margaret A.
158 Slaght were divorced, and on to-wit:—the 27th day of July 1901, the said Margaret A. Slaght made, executed and delivered a warranty deed in the usual form to said Jacob Slaght in which deed the land described in plaintiffs' complaint was included, set out, and described therein, and stated that the property described in said deed was to be his sole and separate property, and the said Jacob Slaght did not, nor did the said Margaret A. Slaght make any transfer or conveyance of any kind, of any portion of said government lots 10 and 11 except as aforesaid prior to the 23rd day of February 1901.

XXII.

That at the time the Spokane & Palouse Railway Company conveyed all its right, title, interest and estate in and to its right of way over and across said lots 10 and 11, Section One, the said Spokane & Palouse Railway Company had not, nor had the defendant Northern Pacific Railway Company acquired from plaintiff by deed, grant or conveyance of any kind, nor had either of said companies acquired by condemnation proceedings against said plaintiff, or against any person, any right over and across said lands, and that the defendant Northern Pacific Railway Company has not since said date received from plaintiff any deed, grant or conveyance, nor has it acquired any right to the land described in the complaint by condemnation proceedings for a right of way over and across said lands.

XXIII.

That the plaintiff was not asked for, nor did he give his consent to the location, construction or maintenance of said railroad over and across said lots at the place where the same was located, or at any other place over and across said lots, and at the time when the said Spokane & Palouse Railway Company entered upon the said land for the purpose of surveying its said railroad right of way, the plaintiff published in the local newspaper the following notice "Notice is hereby given to all persons whatsoever not to trespass
159 on my homestead, which is lots 10, 11, 14 and 15, Sec. 1, Tp. 16, N. R. 45 E. Whitman County Washington," which was the only notice or protest made by plaintiff to the construction of said railroad, except the proceedings in the United States Land Office, and in the State Federal Courts hereinbefore set forth, and that no action was brought by plaintiff to estop or restrain the construction or maintenance of said railroad on the premises in controversy or the warehouses located thereon, or to oust the defendants from the possession thereof, or for damages for the retention of the same, until the commencement of this action, which was commenced within a few months after the decision of the Supreme Court of the United States affirming the judgment of the Supreme Court of the State of Washington.

XXIV.

That there has been constructed on said right of way, on the premises in controversy, valuable and lasting improvements, consisting of railroad bridges, water tank and warehouses, and that it would be a great expense to defendant Northern Pacific Railway Company to change its line of road, and right of way from the lands in controversy, and the improvements constructed on said right of way as aforesaid would be of no practical value, should the road or right of way be changed from the premises in controversy.

XXV.

That said Township Sixteen North of Range Forty Five East, W. M. was surveyed by the United States in the year 1874 and the

plat thereof duly approved and filed in the District Land Office at Walla Walla Washington on the 2nd day of April 1875, and that said government lots 10, 11, 14 and 15 were at the date of the filing of said plat and survey, and ever after remained public land of the United States, not reserved, except as against the claim of the plaintiff.

160 -XVI.

That the defendant Northern Pacific Railway Company disclaims any right to the possession of any part of the premises described in the amended complaint, except that portion thereof described in its answer herein, as its right of way, and shown and designated on the plat marked Exhibit "A" attached to said answer, the possession of which it now has and claims, and the defendants John A. Miller and Anna Miller his wife and the Washington Grain and Milling Company, a corporation, have and hold possession of portions of the premises claimed by said railroad company as its right of way, only as lessees of the defendant Northern Pacific Railway Company, and as warehousemen have warehouses erected on the parts leased to them.

-XVII.

That a space not exceeding twenty five feet wide would enable the defendant Northern Pacific Railway Company to carry freights, passengers and United States mail from Spokane Washington to Lewiston, Idaho, through Palouse Washington, over and across the lands in controversy, and a space one hundred feet square would permit the maintenance of a depot at said Palouse Washington, for the loading and unloading of freights, passengers and United States mail.

Dated July 9th 1904.

CHESTER F. MILLER,
Superior Judge Presiding.

An exception is allowed to defendants to the foregoing findings of fact and to each of them, and it is ordered that the defendants have twenty days in which to make and file written exceptions to said findings of fact, after the service of a copy of the same on John M. Bunn, their attorney at Spokane Washington.

CHESTER F. MILLER,
Superior Judge Presiding.

161 From the foregoing facts the Court finds the following conclusions of law:—

I.

That the plaintiff is the owner in fee simple of the premises described in the amended complaint, and is entitled to the possession of all of said premises except a tract twenty five feet wide, being twelve and one half feet on each side of the center line between the rails of the main track of the defendants' railroad, and a tract one

hundred feet square on which the depot now stands, to enable the defendant Northern Pacific Railway Company to perform its public functions as a carrier of freight, passengers and United States mail.

II.

That the defendants are occupying the premises described in the answer against the will and consent of the plaintiff herein and without right, except that, before a writ of restitution issue herein, for any part of the premises described in the complaint, the defendant Northern Pacific Railway Company, being a public corporation, having the right to condemn sufficient property to conveniently handle its business, should be given ninety days in which to commence proceedings in the proper court, to condemn such part of the premises described in the complaint as it may desire for the purpose of its business as a common carrier of freights, passengers and United States mail, and that upon the failure to commence said condemnation proceedings within said ninety days from the date of the judgment herein, unless said judgment be appealed from and proceedings stayed, and in that event the ninety days in which said condemnation proceedings are to be commenced, if said judgment is affirmed by the Supreme Court, shall commence to run from the date of the filing of the remittitur by this Court, and that the writ of restitution then issue ousting the defendants from all of
162 that portion of the premises described in the complaint except a space twenty five feet wide, being twelve and one half feet on each side of the center line between the rails of its main track on said land as now located, and a tract one hundred feet square, being fifty feet on each side of the center of the side of the depot which faces the main track as it now stands and running back one hundred feet from the center line between the rails of the main track of said railroad.

III.

That judgment be entered according to these findings and conclusions.

Dated July 9th 1904.

CHESTER F. MILLER,
Superior Judge Presiding.

An exception is allowed the defendants to the foregoing conclusions of law and each of them, and it is ordered that the defendants have twenty days in which to make and file written exceptions to the foregoing conclusions of law, after the service of a copy of the same on John M. Bunn, their attorney at Spokane Washington.

CHESTER F. MILLER,
Superior Judge Presiding.

Endorsed: Filed July 13 1904. W. O. McCaw, County Clerk. By Geo. L. Corner, Deputy.

163 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

The Court having made and filed its findings of fact and conclusions of law herein, now on motion of attorneys for plaintiff for a judgment on said findings and conclusions,

It is ordered adjudged and decreed,

That the plaintiff is the owner in fee simple of the land and premises described in the amended complaint, to-wit, Commencing at the Northeast corner of Lot One Block Twenty-seven of Powers Addition to the city of Palouse, according to the recorded plat of said addition now on file in the office of the County Auditor of Whitman County, Washington, and running thence in a straight line to the Southwest corner of Block Twenty-three of said Powers addition; thence along the Southerly boundary of Main Street in said Powers addition to the point where the said Southerly line of Main street intersects the East line of Lot Ten of Section One in Township Sixteen, North of Range Forty-five, East of the Willamette Meridian; thence North to the Northeast corner of said Government Lot Ten; thence West along the North line of said Lot Ten and of Lot Eleven of Section One in Township Sixteen North of Range Forty-five East of the Willamette Meridian to a point where said North line of said Government Lot Eleven intersects the

164 South boundary line — Railroad street in said Powers addition; thence along the said South boundary line of said Railroad street in a southerly direction to the terminous of said boundary line of said street; thence in a straight line in the same course and direction to a point in the Palouse River midway between its banks at low water mark; thence down said Palouse River along a line midway between its banks at low water mark, to a point which would be intersected by the Southerly boundary line of Spokane Avenue in said Powers addition; if said Spokane Avenue were extended across said river without deviation of course; thence in a straight line to the Northwest corner of Block Thirty-five in said Powers Addition; thence along the South boundary line of said Spokane Avenue to point of beginning, Whitman County, Washington.

That the defendants are in possession of and occupying that portion of said described premises, described in their answers against the will and consent of the plaintiff, and are occupying and in possession thereof without right, except that the defendant Northern Pacific Railway Company, as a public carrier, has a right to hold the possession of that part of said described real estate, described as follows, a strip of land twenty five feet wide, being twelve and one-half feet on each side of the center line between the rails of its main track over and across said land, and also a tract one hundred feet square described as follows, Commencing at a point on the center

line between the rails of the main track, fifty feet West of a point on said center line directly opposite the center of the side of the depot building as now standing, which faces said main track; thence easterly along said center line one hundred feet; thence Northerly at right angles to said center line of said track, one hundred feet; thence Westerly parallel with said center line of said track one hundred feet; thence Southerly one hundred feet to place of begin-
165 ning, and as to said tracts last described the plaintiff is not entitled to recover the possession thereof, but as to all the rest of the land described in the amended complaint, it is ordered, adjudged and decreed that the plaintiff recover off and from the defendants, and each and all of them, the possession, and that a writ issue out of this Court under the seal thereof commanding the Sheriff to put plaintiff into the possession thereof said writ however shall not issue herein until after ninety days from this date, or in case an appeal is taken from this judgment, and proceedings hereunder are stayed, then said writ shall not issue until ninety days from the time the remitt-ur from the Supreme Court affirming this judgment has been filed in this Court, and if in the mean time the defendant, Northern Pacific Railway Company, should commence proceedings in the proper court to condemn the land claimed by it and described in its answer herein, for railroad purposes, then said writ shall not be issued as to such land which it may so seek to condemn unless said defendant, Northern Pacific Railway Company should afterwards dismiss such condemnation proceedings or fail to prosecute the same to final judgment, and pay the award that may be made therein.

That the plaintiff have and recover off and from the defendants and each of them, his costs and disbursements herein taxed at $23.20 and that execution issue therefor.

To all of which defendants, and each of them excepts, and their and each of their exceptions are by the Court allowed.

Done in open Court this 9th day of July, 1904.

CHESTER F. MILLER,
Superior Judge Presiding.

It is ordered that Defendants have twenty days in which to file written exceptions to this judgment after the service of a
166 copy of the same on John M. Bunn their attorney at Spokane, Washington.

CHESTER F. MILLER,
Superior Judge Presiding.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 13 day of July 1904. Journal —. Page —. Execution Docket —. W. O. McCaw, County Clerk. By Geo. L. Corner, Dep-

167 In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Findings of Fact and Conclusions of Law Proposed by Defendants.

Come now the defendants above named and each of them, and (before the court has made or filed findings of fact or conclusions of law herein) present, propose and request the court to make findings of fact and conclusions of law as follows, to-wit:

Findings of Fact.

I.

The Spokane and Palouse Railway Company was at all times mentioned in the pleadings, and at all times herein mentioned, and still is, a corporation organized under the laws of the Territory of Washington and thereafter existing under the laws of that Territory and of the State of Washington, and authorized to construct, maintain and operate a line of railway from Spokane, Washington, to Lewiston, Idaho, and over and across the premises described in the pleadings herein.

II.

That at all the times and dates mentioned in the pleadings and at all times herein mentioned, defendant Northern Pacific Railway Company was, and still is, a corporation duly organized and incorporated under the laws of the state of Wisconsin.

168 III.

That at all the times and dates mentioned in the pleadings and at all times herein mentioned, defendant the Washington Grain and Milling Company was, and still is, a corporation organized and incorporated under the laws of the state of Washington.

IV.

That at all the times and dates mentioned in the pleadings and at all times mentioned herein, defendants John A. Miller and Anna Miller, were, and still are, husband and wife.

V.

That the defendants are in possession of the premises described in their separate second amended answer, and shown in the exhibit

thereto attached, and claim the same in the manner and as set forth in said answers, and have been in possession and claiming the same as herein found. That the possession of the defendant Railway Company and its predecessor in interest, has been continuous, open and notorious since the year 1886, and they have occupied and used the same as a right of way for a railroad continually since the year 1886.

VI.

That the plaintiff and Margaret A. Slaght were prior to the year 1883, husband and wife, and said relations continued until the first day of August, 1898, at which time by a decree of the Superior Court of Whitman County, state of Washington, they were divorced.

VII.

That in March, 1883, the said plaintiff and the said Margaret A. Slaght, as husband and wife, settled upon and established their actual residence on government lots ten (10), eleven (11), fourteen (14) and fifteen (15), section one (1), township sixteen (16) north, of range forty-five (45) east of the Willamette Meri-
169 dian, in Whitman County, Washington, and continued to reside thereon until after the — day of —— 1897.

VIII.

That on the 31st day of October, 1887, the said Jacob Slaght presented, in behalf of himself and his said wife, an application to the United States District Land Office, for the District in which said land was situated to enter lots ten, eleven, fourteen and fifteen, section one, township sixteen north, of range forty-five east, of the Willamette Meridian, Whitman County, Washington, under act of congress approved May 20, 1862, entitled "An Act to Declare Homesteads to General Settlers in the Public Domain," and in said application alleged settlement on said land from March 4, 1883, and that the same had been continuous, and that he had built a house on said land, and had improved the same.

IX.

That upon making said application for said land the said Northern Pacific Railroad Company was notified of said application and the said Northern Pacific Railroad Company thereupon filed its objections to the allowance of said application and a hearing was ordered by the United States District Land Office for the District in which said land was situated, for the purpose of determining the rights of the Northern Pacific Railroad Company and of the said Jacob Slaght, in and to said described land, and after the hearing was ordered one William L. Powers intervened and a hearing was had and the local officers rendered a decision and held in words and figures as follows, to-wit:

Opinion.

THE N. P. R. R. Co.
vs.
JACOB SLAGHT, with WM. L. POWERS as Intervenor.

Involving Right to Lots 10-11-14-15, Sec. 1-16-45.

170 On October 31, 1887, Jacob Slaght made homestead application for lots 10-11-14-15 Sec. 1, Tp. 16, N. R. 45 E., alleging settlement on said land March 4th, 1883.

Nov. 7, 1887, the N. P. R. R. Co. was notified of said application, they having selected said land as Indemnity Dec. 17, 1883.

Dec. 6, 1887, said Company filed objections to said application.

Dec. 20, 1888, the Register and Receiver of this office issued notices in said case ordering a hearing between the parties interested for Feb. 20, 1889, before W. N. Ruley, Judge of Probate at Colfax, W. T.

On said Feb. 20, 1889, all parties interested appeared including one W. L. Powers who by his testimony appears to claim said land by prior settlement and residence under act January 13, 1881, commonly called in this country the "Brents Act" if said land is declared to be government land.

From the testimony we find that in 1877, one A. M. Dufield first settled upon and claimed this land including lots 2-7-3 & 6, which together with lots 10-11-14 and 15 made 8 lots; that he shortly afterwards sold his possessory right and improvements to said land to one L. M. Rhodes on his notes fo $650; that when notes became due he could not pay them, and relinquished his right to W. L. Powers who took up and paid said notes in 1878, settled on the land and offered to purchase the Lots 2-7-10-15 from the N. P. R. R. Company for whose benefit said land had been withdrawn from the public settlement and which was being offered for sale by said Company. At the same time Powers' brother John C. Powers applied to said company to buy lots 3-6-11-14; that at this time said land was recognized as railroad land; that Wm. L. Powers built a log cabin on Lot 10 in winter of 1878; that in 1879 he plowed and put in grain six acres of said lot and continued to cultivate said land; that
171 in 1885 he cleared Lot ten entirely and part of lot eleven; that he afterwards raised two crops thereon; that in 1887 the Spokane and Palouse Railroad run through Lot 11 and put a stop to the cultivation of said lot; that in the spring of 1881 he built a house on Lot 7 and moved into it in June of that year and has made it his home since; that he received a warrantee deed from the N. P. R. R. Company to Lots 3-6-11-14, Aug. 4, 1887; that he dissolved partnership with his brother in 1885 in a general business embracing saw mill, store, etc., that in the settlement Wm. took a relinquishment from John of his right to Lots 2-7-10-15 and received a warrantee deed from the company to said Lots July 30, 1887, he having paid to said company the sum of $1249.28 for said

8 lots; that he has always been recognized as the lawful owner of said land by his neighbors with one or two exceptions until it was learned that the Indemnity Land of the N. P. R. R. Co. was in dispute; the evidence further shows that Jacob Slaght the applicant under the homestead law herein applied to said Powers to rent Powers' house on one of said lots in March, 1883 or 4; that they agreed upon a monthly rental of two dollars per month to be paid to said Powers for said house as rent; that said Slaght did in more ways than one pay to said Powers or through some one else to him said rent for several months, that he suddenly learned that said land could be claimed as government land after the promulgation of the Guilford Miller decision and without paying rent any further offered his application for Lots 10-11-14-15, Sec. 1, Tp. 16, N. R. 45, E., showing that he has resided thereon.

The N. P. R. R. Company set up a claim to said land under its withdrawal and selection as Indemnity.

Said land appears to be now covered in part by the Town of Palouse City; that there are streets laid out thereon and houses built thereon, that the parties who laid out said town based their right upon the title acquired as they believed from the said N. P. R. R. Co.

172 The first point that presents itself in this case seems to be the question as to whether said land passed to the railroad company under its grant as Indemnity or whether it is *now* government land subject to entry.

The second point is, which of the parties interested herein as settlers and claimants is entitled to said land?

We find that said land was excepted from the operation of the maps of definite location of Oct. 4, 1880, and from the operation of the selection by said company Dec. 17, 1883, by the settlement of W. L. Powers. Said settlement has been continuous since 1878 to the present and for this reason under the Guilford Miller decision (7 L. D. page 100) the land must be held as government land at this date.

As to the second point it is clearly shown by the testimony that Slaght settled on said land as the tenant of Powers; that he occupied a house on the land owned by Powers. By this occupation of the premises he could gain no rights as against his landlord for it is a well settled principle of law which has always been recognized by the land department that a tenant cannot dispute his landlord's title.

We are of the opinion that this land should be held as government land subject to right of said Powers to purchase said land from the government under the 5th section of the Act of March 3, 1887, or the Act of January 13, 1881, as it appears said Powers holds a warrantee deed from the said N. P. R. R. Co. to said land.

R. GUICHARD, *Register.*
DAVID J. WILCOX, *Receiver.*

June 5, 1889.

X.

That thereafter the said Northern Pacific Railroad Campany
173 appealed from said decision to the Commissioner of the General Land Office and the said Jacob Slaght also appealed from that part of said decision averse to him, and on the 13th day of April, 1895, said Commissioner made and entered his decision in said contest in the words and figures set forth in plaintiff's reply herein.

XI.

That thereafter the said defendant Northern Pacific Railroad Company appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and that thereafter said Secretary of the Interior on the 20th day of May, 1896, made and entered his decision in the words and figures following, to-wit:

Vol. 22. No. 948.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 20, 1896.

NORTHERN PACIFIC R. R. Co.
vs.
JACOB SLAGHT.

Cancellation of Selection. Decision of April 13, 1895, Affirmed.

The Commissioner of the General Land Office.

SIR: The Northern Pacific Railroad Company appeals from your office decision of April 13, 1895, cancelling their selection of Lots 10, 11, 14 and 15, Sec. 1, Tp. 16, N. R. 45 E. Walla Walla land district, Washington.

The facts are sufficiently stated in your said office decision and having considered the evidence and the assignments of error I find no cause for reversing or modifying said decision and the same is accordingly affirmed.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

174 And on the 20th day of April, 1897, there was made, executed and delivered to Jacob Slaght letters patent under the great seal of the United States, describing therein said Lots 10, 11, 14 and 15, Section 1, Township 16 North, of Range 45, East of the Willamette Meridian, which letters patent is in words and figures following, towit:

THE UNITED STATES OF AMERICA.

Homestead Certificate No. 2679. Application 5767.

To all to whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States, a certificate of the Register of the Land Office, at Walla Walla, Washington, whereby it appears that, pursuant to the act of Congress approved 20th of May, 1862, "To secure homesteads to actual settlers on the public domain, and the Acts supplemental thereto, the claim of Jacob Slaght has been established and duly consummated in conformity to law for the Lots numbered ten, eleven, fourteen and fifteen, section one, township sixteen North of range forty-five, east of the Willamette Meridian, in Washington, containing one hundred and sixty acres, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General.

Now know ye, That there is therefore granted by the United States unto the said Jacob Slaght the tract of land above described.

To have and to hold the said tract of land with the appurtenances thereof unto the said Jacob Slaght, and to his heirs and assigns forever subject to any vested and accrued water right for mining, agricultural, manufacturing or other purposes, and the rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of Courts and also subject to the right of the
175 proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to perpetrate or intersect the premises hereby granted as provided by law.

In testimony, I, William McKinley, President of the United States, have caused these letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, on the fourteenth day of April, in the year of our Lord, one thousand eight hundred and ninety-seven, and of the independence of the United States the one hundred and twenty-first.

By the President,

WILLIAM McKINLEY,
By M. McKEAN, *Secretary.*

Recorded Vol 6A, Page 248.
[SEAL.]

Received and recorded the 4th day of May, 1897, at 8.50 o'clock a. m. at the request of Jacob Slaght.

JOHN TOBIN,
County Auditor.

XII.

That said Spokane and Palouse Railway Company constructed and completed a railroad upon, over and across said government lots ten and eleven during the year of 1886 and the first half of the

year 1887, and that prior to the construction of said railroad survey of said road had been made and staked out over and across said premises, and the road so constructed conformed to the survey so made and staked out as aforesaid, and from and after the completion of said railroad it was operated daily and continuously in the carrying of freight, passengers and United States mail, and
176 that Exhibit A attached to the answers herein shows the line of said road as staked out, located, constructed and operated as aforesaid. That before the location and construction of said railroad and in the month of April, 1886, the said Spokane and Palouse Railway Company filed with the Secretary of the Interior of the United States a copy of its articles of incorporation and due proofs of its organization under the same and the filing of said papers was duly approved by said Secretary of the Interior on or about May 11, 1886; that after the location and construction of said railroad said Spokane and Palouse Railway Company filed in the United States District Land Office for the district within which said premises were situated a map or profile of its road showing the line thereof extending over and across said lots ten, eleven, fourteen and fifteen, of said section one, township sixteen, north, range forty-five east, W. M. and extending from a point at Belmont, Whitman County, Washington Territory to a point at Genesee, Nez Perce County, Idaho Territory, a distance of seventy two and thirty-seven-hundredths (72.37) miles. And thereafter said map was duly transmitted by the officers of said District Land Office to the Secretary of the Interior, and said map and filing thereof was thereafter duly approved by said Secretary of the Interior on or about June 27, 1888.

XIII.

That in the construction of said railroad which runs from Spokane, Washington, to Lewiston, Idaho, said Spokane and Palouse Railway Company expended a large sum of money, and was at a great expense in so doing.

XIV.

That at the time of the construction of said railroad, the plaintiff resided upon said land, and in a house located at a point within fifteen feet of the rails of the main line, and at a point about fifty
177 feet west of government lots nine and ten in said section one, and by observation knew that the said road was being constructed, and that large sums of money were being expended and paid out, on account of said road, and that said railroad was being constructed for carrying freight and passengers thereon and thereover, and knew that the Spokane and Palouse Railway Company then and thereafter claimed a right of way one hundred (100) feet wide on either side of said main line, and knew of the making and marking of the survey so made as aforesaid.

XV.

That at the time when the surveyors first entered upon said land for the purpose of surveying and locating said railroad, the plaintiff published in the Palouse News, a weekly newspaper printed and published at Palouse City, Washington, a notice as follows: "Notice is hereby given to all persons whomsoever not to trespass on my homestead claim which is: Lots 10, 11, 14 and 15, Sec. 1, Tp. 16, N. R. 45 E. W. M., Whitman County, W. T., Signed Jacob Slaght," which was the only notice or formal objection which the plaintiff made to the construction of said railroad.

XVI.

That in August, 1887, the said Northern Pacific Railroad Company, claiming to be the owner of said lots 10 and 11, sold and conveyed the same by deed of conveyance, containing the usual covenants and warranties, to William L. Powers, and that afterwards, on the 14th day of September, 1887, the said William L. Powers and wife conveyed by deed of conveyance to the Spokane and Palouse Railway Company a tract of land for a right of way 200 feet wide, being the land shown and marked in defendant's Exhibit A in their answer, as the tract occupied by the defendant Northern Pacific Railway Company, as its right of way.

178 XVII.

That on the 12th day of May, 1897, said Spokane and Palouse Railway Company, W. L. Powers, Hattie Dean, Edward Dean, F. S. Bell, Ivan Chase, J. K. McCornack, Ann J. Clyde, J. R. Malhern, Spokane & Palouse Land Company, a corporation, Palouse Mill Company, a corporation, and A. F. Pugh who were the grantees of the said William L. Powers, filed in the Superior Court of Whitman County, Washington, their complaint against the said Jacob Slaght, for the purpose of having the said Jacob Slaght declared a trustee and as holding said land in trust for the plaintiff and directing a conveyance from him to the plaintiffs and enjoining the said Jacob Slaght from bringing any action to oust the defendants, and subsequently they filed a second amended complaint which amended complaint and prayer are fully set forth in plaintiff's reply herein.

XVIII.

That the said Jacob Slaght demurred to said amended complaint, and said demurrer was by the court sustained, the order containing said demurrer being set out in plaintiff's reply herein.

XIX.

That thereafter and on towit the 24th day of June, 1898, the plaintiffs in said action, appealed from said order and final judgment sustaining the said demurrer to the complaint, to the Su-

preme Court of the State of Washington, and that thereafter on the 14th day of January, 1899, the Supreme Court of the State of Washington made and entered its judgment in said cause in the words and figures set out in plaintiff's reply herein.

XX.

That thereafter the said plaintiffs took said cause to the Supreme Court of the United States on a writ of error, and the said Supreme Court of the United States having considered the same, on the 14th day of January, 1899, affirmed the said judg-
179 ment of the said Supreme Court of the State of Washington, as aforesaid.

XXI.

That after the said Jacob Slaght and Margaret A. Slaght were divorced as aforesaid, and on to-wit the 27th day of July, 1901, the said Margaret A. Slaght executed and delivered a warranty deed in the usual form to said Jacob Slaght, in which deed the land described in plaintiff's complaint was included, set out and described therein and stated that the property described in said deed was to be his separate and sole property, and the said Margaret A. Slaght did not, nor did the said Jacob Slaght, make any transfer or conveyance of any kind, of any portion of said government lots 10 and 11 except as aforesaid, prior to the 23rd day of February, 1901, unless the facts herein stated constitute a transfer or conveyance.

XXII.

That on the 21st day of February, 1899, the Spokane and Palouse Railway Company, conveyed all if its right, title, interest and estate in and to the right of way over and across lots 10 and 11, section 1, as aforesaid, together with all its property to the defendant Northern Pacific Railway Company, and that ever since then the said Northern Pacific Railway Company has maintained and operated said road in the carrying of freight, passengers and United States mail from Spokane, Washington, to Lewiston, Idaho, and intervening points.

XXIII.

That on the 21st day of February, 1899, when the said Spokane & Palouse Railway Company transferred and conveyed its interest in and to the right of way over and across lots 10 and 11 as aforesaid, to the defendant, the Northern Pacific Railway Company, the said Spokane and Palouse Railway Company had not, nor had the Northern Pacific Railway Company acquired from plain-
180 tiff by deed, grant or conveyance, of any kind, unless the facts herein found amount thereto, nor had the Spokane & Palouse Railway Company nor the Northern Pacific Railway Company acquired by condemnation proceedings against plaintiff, any right over and across said land, and the said defendant Northern Pacific Railway Company had not since said date received from

plaintiff any deed, grant or conveyance of any kind, other than the facts herein show, nor has it acquired any right to the land described in the complaint by condemnation proceedings against plaintiff for right of way over and across said land.

XXIV.

That the plaintiff was not asked for nor did he give his consent (unless the facts herein found show such consent) to the location, construction or erection of said railroad over and across said lots at the place where the same was located, or at any other place, over and across said lots, nor did the plaintiff make any formal protest or objection to the construction of said road, other than said notice contained in said notice published in the paper as aforesaid and in the proceedings in the United States Land Office, and in the State and Federal Courts as herein set forth.

XXV.

That without objection on the part of plaintiff (other than the publication of said notice) there has been constructed upon said right of way on the premises in controversy valuable and lasting improvements in the shape of railroad bridges, water tank and warehouses, which would be practically of no value should the road and right of way of defendant Northern Pacific Railway Company be changed from the premises in controversy.

That it would be a great expense to defendant, the Northern Pacific Railway Company, to change its line of road and right of way over the premises in controversy, and that some of the
181 improvements of said road consisting of bridges and water tank and embankments would be of no practical value, should the road or right of way be changed from the premises in controversy.

XXVI.

That the defendant, Northern Pacific Railway Company, does not claim any part or portion of lots 10 and 11, section 1, as aforesaid, except a strip 200 feet wide, being 100 feet on each side of the center of the said road over and across said lots, as the same is now constructed, shown and designated on the plat marked Exhibit A, and attached to the answer herein.

XXVII.

That the defendants John Miller and Anna Miller, his wife, and the Washington Grain and Milling Company, a corporation, are the owners of and operating warehouses situated, designated and located on said plat marked Exhibit A of defendants' answer, said warehouses having been constructed and erected on said land, under a grant or lease of premises from the said Northern Pacific Railway Company, or its grantor, the Spokane and Palouse Railway Company, but without permission of the plaintiff herein (unless the facts herein found show such consent).

XXVIII.

That the builders of said warehouses knew, and the Spokane & Palouse Railway Company knew, or could have known had they made inquiry, that the question of the title to said land, and that portion thereof claimed by the said Northern Pacific Railway Company, was in controversy in the land department of the United States undecided and undetermined as in the manner and at the time and dates hereinbefore set forth.

XXIX.

That the said warehouse now occupied by John A. Miller
182 was partially built in 1892 by C. S. Farnsworth and J. T. Waters, and prior to the construction thereof the plaintiff notified the said Farnsworth and Waters not to construct said warehouse on said land; and also stated to them that said land belonged to plaintiff, and the right thereto was in contest and pending in the United States Land Office undetermined. That said Miller has built additions to said warehouse.

XXX.

That during the time that all of said warehouses were being constructed the plaintiff was residing upon said government lots 10 and 11, section 1, as aforesaid, and on that portion thereof, as set forth in paragraph XIV, now claimed by the defendant Northern Pacific Railway Company as its right of way.

XXXI.

That no suit or action was brought by plaintiff to prevent or restrain the erection, construction or maintenance on the premises in controversy of the said railroad or any of said warehouses, nor to procure the possession thereof or damages for the retention of the same, prior to the commencement of this action, and that this action was commenced within a few months and as soon as practicable after the decision of the Supreme Court of the United States, affirming the decision of the Supreme Court of the State of Washington.

XXXII.

That said township sixteen north, of range forty-five east, was surveyed by the United States in the year 1874 and a plat thereof duly approved was filed in the District land office at Walla Walla Washington Territory, on the 2nd day of April, in the year 1875, and said government lots 10, 11, 14 and 15 were at the date of filing said plat and survey, and thereafter remained, except
183 for the claims of said Jacob Slaght and the Spokane & Palouse Railway Company, public lands of the United States not reserved.

XXXIII.

That the defendants herein other than the Northern Pacific Railway Company are tenants of said Railway Company, and have and hold possession of portions of the premises described in the complaint only as such lessees for a short period of time, and as warehousemen and have warehouses erected on the parts thereof leased to them, and they receive and accept as warehousemen all grain tendered to them to the extent of their capacity, for shipment over the line of the Northern Pacific Railway Company.

XXXIV.

That it would be possible for the defendant Northern Pacific Railway Company to carry freight, passengers and U. S. Mail from Spokane, to and from Lewiston, Idaho, through Palouse, Washington, on or over a right of way across plaintiff's land, not exceeding 25 feet wide and a space 100 feet square would permit the erection of a depot at Palouse, but great inconvenience would result to the citizens of Palouse and vicinity and to said railway company if this were all the facilities had by said railway company for receiving and delivering freight and passengers and U. S. Mail; that for the convenience, prompt and expeditious receipt and delivery and shipment and handling of freight and for the erection of warehouses and elevators for the storing of freight and wheat at Palouse Washington, it is necessary to have in addition to the main track, depot, switches, turnouts, warehouses, water tanks, elevators, and other structures which require a right of way a space as large as that claimed by the defendant railway company as shown by the Exhibit attached to its answer, that is, the whole of the premises in controversy in this action.

184 XXXV.

That said town of Palouse is a thriving municipal corporation of the third class, and was organized and incorporated under the laws of the state of Washington, on the 17th day of June, 1889, and the territory included in the limits thereof, at the date of its organization was the following, to-wit:

Commencing at the northeast corner of Lot Three (3) in Section six (6), in township sixteen (16), north of Range forty-six (46), East of Willamette Meridian, in Whitman County, State of Washington, running thence west along the township line one (1) mile to the center line of section one (1) in said township sixteen (16), north of range forty-five (45), east of the Willamette Meridian, running thence south along the center line of Section one (1) aforesaid 285 rods, thence running due east parallel with the north boundary line thereof one (1) mile to a point on the east line of the southeast quarter (SE ¼) of the northwest quarter (NW ¼) of the said section six (6) aforesaid, running thence north parallel with the west boundary line thereof to the North Palouse River, thence easterly up said river to a point in said river where the east line of Winfield Street in Fisher's Addition to Palouse City, Washington,

as shown upon the recorded plat thereof now of record in the auditor's office of Whitman County, Washington, produced south, will cross said river being about 690 feet east of the east line of said Lot three (3), in Section six (6) aforesaid, running thence north to the center line of Idaho Avenue in said Fisher's Addition aforesaid, running thence west along the center line of Idaho Avenue to the east line of Lot three (3) in Section six (6) in said Township sixteen (16), aforesaid, and thence running north to the township line the place of beginning, lying, situate and being in section one (1), in township sixteen (16), and range forty-five (45), E. W. M. aforesaid, and in Section six (6), township sixteen (16), Range forty-
185 six (46) E. W. M. aforesaid.

XXXVI.

That the land involved in this action is much greater in value now than it was in 1886 or 1887. That said railway company increased the value thereof to some extent, and there has been a general rise in values of all lands in the vicinity of the land involved in this action.

XXXVII.

On the 3rd day of December, 1901, the county commissioners of Whitman County, Washington, by an order entered upon their records and delivered to the county treasurer ordered that all taxes levied and assessed against said government lots 10 and 11, section one aforesaid, for the year 1896 and all prior years be cancelled and the same were by said treasurer cancelled upon the tax rolls of said county, and on the 4th day of August, 1902, said board of county commissioners of Whitman County made and entered an order on their records cancelling all the taxes for the year- 1897-8-9-1900 and 1901 levied and assessed against lots and blocks in Powers Addition to Palouse contained within said government lots 10 and 11 aforesaid, and for said years 1897-8-9-1900 and 1901, said government lots 10 and 11 have been assessed to Jacob Slaght and Margaret A. Slaght and to their respective grantees without deduction therefor for said right of way. That the defendant Northern Pacific Railway Company and its grantor Spokane and Palouse Railway Company during all of said years and ever since the year 1886 were and have been assessed for state and county taxes on its said road in Whitman County, at the uniform rate of a certain sum per mile for main tracks, and — certain sum per mile for side tracks which include the right of way owned or claimed by said company in said county.

186 *Conclusions of Law.*

From the foregoing Findings of Fact the Court deduces the following Conclusions of law:

That the defendant the Northern Pacific Railway Company is the owner of a right of way two hundred feet in width over and across said lots ten, eleven, fourteen and fifteen, of section one, township

sixteen north of range forty-five east, Willamette Meridian, Whitman County, Washington, which said right of way is bounded by two lines each parallel with and distant one hundred feet from the center line of the main track of the railway of said Northern Pacific Railway Company now located and operated over and across said lots ten, eleven, fourteen and fifteen, and said defendant, Northern Pacific Railway Company, is entitled to the exclusive possession of said strip of land last above described and that the defendants John A. Miller and Anna Miller, his wife, and the Washington Grain and Milling Company are rightfully in possession of those respective portions of said strip of land now occupied by them as tenants of said defendant Northern Pacific Railway Company. That the above entitled action be dismissed and that the defendants are entitled to their costs and disbursements incurred in defending this action.

By the Court.

—— ——, *Judge.*

The above and foregoing findings and conclusions were presented and requested by defendants before the court made, signed or filed findings or conclusions, or rendered decree herein. To the refusal to make, sign or file the same defendants excepted, and exception allowed.

Dated this 9th day of July, 1904.

CHESTER F. MILLER, *Judge.*

187 Endorsed: Filed July 13, 1904. W. O. McCaw, Clerk. Geo. L. Corner, Deputy.

188 In the Superior Court of the State of Washington in and for the County of Whitman.

No —.

JACOB SLAGHT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Finding of Fact Proposed by Defendants.

Come now the defendants above named and each of them, and (before the Court has made or filed findings of fact or conclusions of law herein) present, propose and request the court to make a finding of fact as follows, to-wit:

I.

That before the construction of the railroad of said Spokane and Palouse Railway Company across the premises in controversy and before May 11th, 1886, the said Spokane and Palouse Railway Com-

pany filed with the Secretary of the Interior of the United States a copy of its articles of incorporation and due proofs of its organization under the same, and the filing thereof was duly approved by the Secretary of the Interior on or about May 11th, 1886.

II.

That after the construction of its railroad across the premises in controversy the said Spokane and Palouse Railway Company filed in the United States District Land Office, for the district in which said premises were situated, a map or profile of its road, showing the line thereof extending over and across the premises in controversy, and thereafter said map was duly transmitted by the
189 officers of said district land office to the Secretary of the Interior, and said map and the filing thereof duly approved by said Secretary of the Interior on or about July 27th, 1888.

III.

Conclusions of Law.

That the Spokane and Palouse Railway Company the predecessor in interest of the defendant Northern Pacific Railway Company acquired a right of way two hundred (200) feet in width, viz. one hundred (100) feet on each side of the center of the defendant railway company's railroad, under — by virtue of that certain act of congress entitled, "An act granting to railroads the right of way through the public lands of the United States", approved March 3rd, 1875; and that by virtue thereof the defendant, the Northern Pacific Railway Company, and the other defendants as its lessees are rightfully in possession under said act of congress of the premises described in the several answers of the several defendants.

The above and foregoing findings and conclusions were presented and requested by defendants before the Court made, signed or filed findings or conclusions, or rendered decree herein. To the refusal to make, sign or file the same defendants excepted, and exception is hereby allowed.

Dated this 9th day of July, 1904.

CHESTER F. MILLER, *Judge.*

Endorsed: Filed July 13 1904. W. O. McCaw, Clerk. By Geo. L. Corner, Deputy.

190 In the Superior Court of the State of Washington in and for the County of Whitman.

No —.

JACOB SLAGHT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Exceptions to Findings of Fact and Conclusions of Law and to Refusals to Make Findings of Fact and Conclusions of Law.

Come now the defendants in the above entitled action, and except to the findings of fact made and found by the court herein, and filed with the clerk of the court, as follows:

I.

Defendants except to that part of finding of fact number six (VI) which finds that Jacob Slaght and wife settled on the land in controversy with intent to claim the same under the homestead laws of the United States.

II.

Defendants except to that portion of finding of fact number seven (VII) wherein the court finds that the lands therein described were withdrawn from settlement by order of the secretary of the interior.

III.

Defendants except to finding of fact number eight (VIII) and the whole and every part thereof.

IV.

Defendants except to finding of fact number nine (IX) and the whole and every part thereof.

191 V.

Defendants except to that portion of finding of fact number twenty one (XXI) wherein the court finds that Jacob Slaght made no transfer or conveyance of any kind, of any portion of government lots ten (10) and eleven (11) prior to February 23rd, 1901.

VI.

Defendants except to that portion of finding of fact number twenty-two (XXII) wherein the court finds that the Spokane and Palouse Railway Company acquired no right of way from the plaintiff by deed, grant, or conveyance of any kind.

VII.

Defendants except to all that part of finding of fact number twenty three (XXIII) wherein the court finds that the plaintiff did not give his consent to the location, construction or maintenance of said railroad across the premises in controversy.

VIII.

Defendants except to all that portion of finding of fact number twenty five (XXV) in which the court finds that the land therein mentioned ever after the filing of the plat of survey, remained public land of the United States, except as against the claim of plaintiff.

Defendants except to the conclusion of law made and found by the court herein, and filed with the clerk of the court, as follows, to-wit:

I.

Defendants except to all that portion of the first conclusion of law in which the court finds that the plaintiff is the owner and entitled to the possession of a portion of the premises in controversy.

192

II.

Defendants except to all that portion of conclusion of law numbered two (II) wherein the court finds that defendants are occupying a portion of the premises in controversy without right.

III.

Defendants except to the whole of conclusion of law number three (III).

Defendants except to the failure and refusal of the court to make, find, adopt and sign each of the findings of fact presented by defendants herein, as follows, to-wit:

I.

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number five (V) as proposed and requested by defendants.

II.

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number fourteen (XIV) as proposed and requested by defendants.

III

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number fifteen (XV) as proposed and requested by defendants.

IV.

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number sixteen (XVI) as proposed and requested by defendants.

V.

193 Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number twenty five (XXV) as proposed and requested by defendants.

VI.

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number twenty seven (XXVII) as proposed and requested by defendants.

VII.

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number thirty (XXX) as proposed and requested by defendants.

VIII.

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number thirty one (XXXI) as proposed and requested by defendants.

IX.

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number thirty two (XXXII) as proposed and requested by defendants.

X.

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number thirty three (XXXIII) as proposed and requested by defendants.

XI.

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number thirty four (XXXIV) as proposed and requested by defendants.

XII.

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number thirty five (XXXV) as proposed and requested by defendants.

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XIII.

Defendants except to the failure and refusal of the court to make, find, adopt and sign finding of fact number thirty six (XXXVI) as proposed and requested by defendants.

XIV.

Defendants except to the failure and refusal of the court to make, find, adopt and sign that portion of finding of fact number thirty seven (XXXVII) proposed and requested by defendants, as follows, to-wit:

"That the defendant Northern Pacific Railway Company and its grantor Spokane and Palouse Railway Company during all of the years since the year 1886, were and have been assessed for state and county taxes on its railroad in Whitman County, at the uniform rate of a certain sum per mile for main tracks, and a certain sum per mile for side tracks which include the right of way owned or claimed by said company in said county."

XV.

Defendants except to the failure and refusal of the court to make, find, adopt and sign as findings of fact herein, the matters and things contained in the agreed statement of facts filed herein, upon which the hearing in this cause was had, and which are not included in the findings of fact made by the court and filed herein, as proposed and requested by defendants before the court made and filed its findings of fact and conclusions of law herein.

Defendants except to the failure and refusal of the court to make, find, adopt and sign conclusions of law presented and requested by defendants, as follows, to-wit:

I.

Defendants except to the failure and refusal of the court to make, find, adopt and sign the following conclusion of law presented
195 and requested by defendants, to-wit:

"That the defendant the Northern Pacific Railway Company is the owner of a right of way two hundred feet in width over and across said lots ten, eleven, fourteen and fifteen of section one, township sixteen north of range forty-five east, Willamette Meridian, Whitman County, Washington, which said right of way is bounded by two lines each parallel with and distant one hundred feet from the center line of the main track of the railway of said Northern Pacific Railway Company now located and operated over and across said lots ten, eleven, fourteen and fifteen, and said defendant, Northern Pacific Railway Company, is entitled to the exclusive possession of said strip of land above described and that the defendants John A. Miller and Anna Miller, his wife, and the Washington Grain and Milling Company are rightfully in possession of those respective portions of said strip of land now occupied by them as tenants of said defendant Northern Pacific Railway Company."

II.

Defendants except to the failure and refusal of the court to make, find, adopt and sign the following conclusion of law presented and requested by defendants, to-wit:

"That the Spokane and Palouse Railway Company the predecessor in interest of the defendant Northern Pacific Railway Company acquired a right of way two hundred (200) feet in width, viz: one hundred (100) feet on each side of the center of the defendant railway company's railroad, under and by virtue of that certain act of Congress entitled "An Act Granting Railroads the right of way through public lands of the United States," approved March 3rd, 1875; and that by virtue thereof the defendant, the Northern Pacific Railway Company, and the other defendants as its lessees are rightfully in possession under said act of congress of the
196 premises described in the several answers of the several defendants."

STEPHENS & BUNN,
JOHN M. BUNN,
Attorneys for Defendants.

JAMES B. KERR,
Of Counsel.

Endorsed: Filed July 18 1904. W. O. McCaw, Clerk.

197 In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Further Exceptions to Findings of Fact.

Come now the defendants in the above entitled action, and further except to the findings of fact made and found herein by the court, and filed with the clerk, as follows:

Defendants except to all that portion of finding of fact number twenty five (XXV) in which the court finds that the land therein mentioned ever after the filing of the plat of survey, remained public land of the United States, except as against the claim of plaintiff.

STEPHENS & BUNN,
JOHN M. BUNN,
Attorneys for Defendants.

JAMES B. KERR,
Of Counsel.

Endorsed: Filed in the office of the Clerk of the Superior Court, this 18 day of July 1904. Journel —, Page —. Execution Docket —. W. O. McCaw, County Clerk. By Geo. L. Corner, Deputy.

198 In the Superior Court of the State of Washington in and for the County of Whitman.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY ET AL., Defendants.

On this 10th day of September, 1904, plaintiff and defendants in the above entitled action appeared in open court by their respective attorneys, and stipulated and agreed that the supersedeas or stay bond upon appeal of defendants to the supreme court of the state of Washington from the final decree entered in said case should be fixed at the sum of five hundred dollars ($500.00); and in pursuance of said stipulation and upon motion of defendants for order of court fixing the amount of said supersedeas or stay bond, and the court being fully advised in the premises, it is hereby,

Ordered, that the amount of the supersedeas bond or bond for stay of execution pending appeal of said case to the supreme court of the state of Washington from the final decree entered herein be, and the same is hereby, fixed at the sum of five hundred dollars ($500.00).

Done in open court this 10th day of September, 1904.

CHESTER F. MILLER, *Judge.*

Endorsed: Filed Sept 22" 1904. W. O. McCaw, Clerk.

199 In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Notice of Appeal.

To Jacob Slaght, plaintiff in the above entitled action, and to Thomas Neill and W. E. McCroskey, attorneys for said plaintiff:

You and each of you are hereby notified that the above named defendants, Northern Pacific Railway Company, John A. Miller, Anna Miller and the Washington Grain and Milling Company, do hereby appeal to the Supreme Court of the State of Washington from that portion of that certain final decree, made and signed on July 9th, 1904, and rendered, entered and filed in the above entitled action, in the above entitled court on the —, wherein it is decreed that the plaintiff is the owner in fee simple of that portion of the premises described in his amended complaint in said action and described in said decree, which portion is also described in the several amended answers of these defendants and in such answers alleged to be in

the possession of these defendants; and defendants do hereby appeal to said Supreme Court from that portion of said decree in which it is decreed that the defendants are occupying portions of the premises described in amended complaint of plaintiff or portions of premises described in the second amended answers of defendants herein without right; and defendants do hereby appeal to said Supreme Court from that portion of said decree in which it is ordered, ad-
200 judged and decreed that plaintiff recover of and from defendants, and each and all of them, the possession of the premises described in the amended complaint of plaintiff, excepting a strip of land twenty-five (25) feet wide, being twelve and one-half (12½) feet on each side of the center line between the rails of the main track of the Northern Pacific Railway Company over and across the lands described in plaintiff's amended complaint, and excepting a tract of land one hundred feet square, described as follows: Commencing at a point on the center line between the rails of the main track of the Northern Pacific Railway, fifty (50) feet west of a point on said center line directly opposite the center of the side of the depot building as now standing, which faces said main track, hence easterly along said center line one hundred (100) feet, thence northerly at right angles to said center line of said main track one hundred (100) feet, thence westerly parallel with said center line of said main track one hundred (100) feet, thence southerly one hundred (100) feet to place of beginning; and defendants do hereby appeal to said Supreme Court from each and every portion of said decree, wherein it is ordered, adjudged and decreed that plaintiff recover of and from defendants the possession of any of the premises described in the amended complaint of plaintiff or described in the second amended answers of defendants in said action; and defendants do hereby appeal to said Supreme Court from that portion of said decree in which it is ordered, adjudged and decreed that a writ issue out of said Superior Court commanding the sheriff to put plaintiff into possession of a portion of the premises described in the amended complaint of plaintiff; and defendants do hereby appeal to said Supreme Court from that portion of said decree in which it is ordered and adjudged that plaintiff have and recover of and from defendants his costs and disbursements in *in* the
201 above entitled action.

STEPHENS AND BUNN,
JOHN M. BUNN,
JAMES B. KERR,
Attorneys for Defendants.

STATE OF WASHINGTON, *County of Spokane, ss:*

Charles Grant, being first duly sworn, upon oath deposes and says:

That he is and was, at all the times herein mentioned, over the age of twenty one years, a citizen of the state of Washington and competent to be a witness in the above entitled action, not being interested therein; that John M. Bunn is one of the attorneys for defendants in said action, and has his office and resides in the city and

county of Spokane, Washington, and affiant is a clerk in the office of said John M. Bunn; that Thomas Neill is one of the attorneys for plaintiff in said action and has his office and resides in the town of Colfax, Whitman County, Washington; that there is a daily United States mail service between said city of Spokane and said town of Colfax; that, on the 6th day of October, 1904, affiant served the above and foregoing notice of appeal upon attorneys for plaintiff, by depositing a full, true and correct copy thereof in the post-office at said city of Spokane, enclosed in a sealed envelope, postage thereon being prepaid, and said envelope being addressed to Thomas Neill, Esq., Attorney at Law, Colfax, Whitman County, Washington.

CHARLES GRANT.

Subscribed and sworn to before me this 6th day of October, 1904.

E. T. WHITE,
Notary Public in and for the State of Washington,
[SEAL.] *Residing at Spokane, Washington.*

202 Endorsed: Filed October 8" 9 A. M. 1904. W. O. McCaw, Clerk.

203 In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Appeal and Supersedeas Bond.

Know all men by these presents, That the Northern Pacific Railway Company, a corporation, John A. Miller and Anna Miller, his wife, and the Washington Grain and Milling Company, a corporation, as principals, and the National Surety Company, a corporation organized under the laws of the state of New York and authorized to do business as a surety company in the state of Washington, as surety, are held and firmly bound unto the above named plaintiff, Jacob Slaght, and to his heirs, executors, administrators and assigns, in the sum of eight hundred dollars ($800.00), for the payment of which sum, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Dated this 7th day of October, 1904.

The conditions of the above obligation are such that,

Whereas, a certain final decree was made and signed in the above entitled action by the above named court, on the 9th day of July,

1904, and rendered, entered and filed in said action on the 13th day of July, 1904; and

Whereas, defendants above named have appealed to the supreme court of the state of Washington from certain portions of
204 said decree, which portions of decree appealed from are fully set forth in the notice of appeal served and filed by defendants herein; and

Whereas, the court has fixed the amount of the supersedeas or stay bond upon appeal from the final decree in the above entitled action at the sum of five hundred dollars ($500.00), as appears by the order of the court on file herein; and

Whereas, said defendants and appellants desire a stay of proceedings upon said final decree, and this bond is intended as an appeal bond and also as a supersedeas or stay bond,—

Now, therefore, if the above bounden defendants and appellants, Northern Pacific Railway Company, John A. Miller, Anna Miller, and the Washington Grain and Milling Company, shall and will pay all costs and damages that may be awarded against them on the said appeal, or on the dismissal thereof, and shall and will satisfy and perform the said portions of the said decree appealed from, in case said decree shall be affirmed as to said portions, and any judgment, order or decree which said supreme court may render or make, or order to be rendered or made by the said superior court, and shall pay all rents of or damages to property accruing during the pendency of this appeal, out of the possession of which plaintiff and respondent shall be kept by reason of the appeal, in case said decree be affirmed as to the portions appealed from,—then and in that event this bond to become null and void; otherwise to be and remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY, [SEAL.]
By JOHN M. BUNN, *Its Attorney.*
JOHN A. MILLER, [SEAL.]
By JOHN M. BUNN.
ANNA MILLER, [SEAL.]
By JOHN M. BUNN.
205 WASHINGTON GRAIN AND MILLING COMPANY,
By J. K. SMITH, *Secretary & Treasurer.*
NATIONAL SURETY COMPANY,
By E. C. MACDONALD,
Its Attorney in Fact.

[Seal Nat'l Surety Co.]

Endorsed: Filed October 8th 9.05 1904. W. O. McCaw, Clerk.

206 STATE OF WASHINGTON, *County of Whitman, ss:*

I, W. O. McCaw, County Clerk and *ex officio* Clerk of the Superior Court of the State of Washington, in and for the County of Whitman, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled

cause as I have been directed by the appellants to transmit to the Supreme Court.

In Testimony Whereof, I have hereunto set my hand and the seal of said Superior Court this 9th day of December, 1904.

[Superior Court Seal.]

W. O. McCAW,
County Clerk.

207 5429.

In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Statement of Facts.

Filed in the Office of Clerk of Superior Court Aug. 8, 1904. W. O. McCaw, Clerk.

Service of within statement of facts proposed by defendants by receipt of a full, true and correct copy thereof after filing of this original with clerk of court is hereby admitted this 8th day of August, 1904.

THOMAS NEILL,
Attorney for Plaintiff.

208 5429.

In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Statement of Facts.

Filed Feb. 13, 1905. C. S. Reinhart, Clerk. F. S. Guyot, Dep.

Be it remembered, That the issues raised by the pleadings in the above entitled action, to-wit, the amended complaint of plaintiff, and the separate second amended answers of defendants, and the

replies of plaintiff to the separate second amended answers of defendants, came on regularly for hearing and trial on November 6, 1903, before the court above named, without a jury, the Honorable C. F. Miller, presiding.

And thereafter the following proceedings were had and done to-wit:

The parties to the above entitled action having made and filed an agreed statement of facts covering certain of the issues raised by the pleadings herein, the same was offered and received in evidence and submitted to the court, which said agreed statement of facts is in words and figures following, towit:

In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendants.

Stipulation of Facts.

It is hereby stipulated and agreed that for the purposes of the trial of this action, the following shall be taken to be true:

209

I.

The Spokane and Palouse Railway Company was at all times mentioned in the pleadings, and at all times herein mentioned, and still is, a corporation organized under the laws of the territory of Washington and thereafter existing under the laws of that territory and of the state of Washington, and authorized to construct, maintain and operate a line of railway from Spokane, Washington, to Lewiston, Idaho, and over and across the premises described in the pleadings herein.

II.

That at all the times and dates mentioned in the pleadings and at all times herein mentioned, defendant Northern Pacific Railway Company was, and still is, a corporation duly organized and incorporated under the laws of the state of Wisconsin.

III.

That at all the times and dates mentioned in the pleadings and at all times herein mentioned, defendant the Washington Grain and Milling Company was, and still is, a corporation duly organized and incorporated under the laws of the state of Washington.

IV.

That at all the times and dates mentioned in the pleadings and at all times mentioned herein, defendants John A. Miller and Anna Miller were, and still are, husband and wife.

V.

That the defendants are in possession of the premises described in their separate second amended answer and shown in the exhibit thereto attached, and claim the same in the manner and as set forth in said answers, and have been in the possession and claiming the same as herein stipulated. That the possession of the defendant railway company and its predecessors in interest, has been continuous open and notorious since the years 1886, and they have occupied and used the same as a right of way for railroad continually since the year 1886.

VI.

That the plaintiff and Margaret A. Slaght were prior to the year 1883, husband and wife, and said relations continued until
210 the first day of August, 1896, at which time by a decree of the superior court of Whitman county, state of Washington, they were divorced.

VII.

That in March, 1883, the said plaintiff and the said Margaret Slaght, as husband and wife, settled upon and established their actual residence on government lots ten (10) eleven (11) fourteen (14) and fifteen (15) section one (1) township 16 north, of range 45 east, of the Willamette Meridian, in Whitman county, Washington, and continued to reside thereon until after — day of ——, 1897.

VIII.

That on the 31st day of October, 1887, the said Jacob Slaght presented, in behalf of himself and his said wife, an application to the United States district land office, for the district in which said land was situated to enter lots 10, 11, 14 and 15, section 1, township 16 north, of range 45 east, of the Willamette Meridian, Whitman county, Washington, under act of congress approved May 20, 1862, entitled "An Act to Declare Homesteads to General Settlers in the Public Domain," and in said application alleged settlement on said land from March 4, 1883, and that the same had been continuous, and that he had built a house on said land, and had improved the same.

IX.

That upon making said application for said land the said Northern Pacific Railroad Company was notified of said application and the Northern Pacific Railroad Company thereupon filed its objections to the allowance of said application and a hearing was ordered

by the United States district land office for the district in which said land was situated, for the purpose of determining the rights of the Northern Pacific Railroad Company and of the said Jacob Slaght, in and to said described land, and after the hearing was ordered one William L. Powers intervened and a hearing was had and the local officers rendered a decision and held in words and figures as follows, towit:

Opinion.

THE N. P. R. R. Co.

vs.

JACOB SLAGHT, with WM. L. POWERS as Intervenor.

Involving Right to Lots 10-11-14-15, Sec. 1-16-45.

211 On October 31, 1887, Jacob Slaght made homestead application for lots 10-11-14-15 Sec. 1, Tp. 16 N. R. 45 E., alleging settlement on said land March 4th, 1883.

Nov. 7, 1887 the N. P. R. R. Co was notified of said application, they having selected said land as Indemnity Dec. 17, 1883.

Dec. 6, 1887 said company filed objections to said application.

Dec. 20, 1888 the register and receiver of this office issued notices in said case ordering a hearing between the parties interested for Feb. 20, 1889, before W. N. Ruley, Judge of Probate at Colfax, W. T.

On Feb. 20, 1889 all parties interested appeared including one W. L. Powers who by his testimony appears to claim said land by prior settlement and residence under act — January 13, 1881, commonly called in this country the "Brents Act," if said land is declared to be government land.

From the testimony we find that in 1877 one A. M. Dufield first settled upon and claimed this land including lots 2-7-3 & 6 which together with lots 10-11-14 & 15 made 8 lots; that he shortly afterwards sold his possessory right and improvements to said land to one L. M. Rhodes on his notes for $650.00; that when the notes became due he could not pay them, and relinquished his right to W. L. Powers who took up and paid said notes in 1878, settled on the land and offered to purchase the lots 2-7-10-15 from the N. P. R. R. Company for whose benefit said land had been withdrawn from public settlement and which was being offered for sale by said company. At the same time Power's brother John C. Powers applied to said company to buy lots 3-6-11-14; that at this time said land was recognized as railroad land; that Wm. L. Powers built a log cabin on lot 10 in winter of 1878; that in 1879 he plowed and put in grain 6 acres of said lot and continued to cultivate said land; that in 1885 he cleared lot 10 entirely and part of lot 11; that he afterwards raised two crops thereon; that in 1887 the Spokane and Palouse Railroad run through lot 11 and put a stop to the cultivation of said lot; that in spring of 1881 he built a house on lot 7 and moved into it in June of that year and has made it

his home since; that he received a warrantee deed from the
212 N. P. R. R. Company to lots 3-6-11-14 Aug. 4, 1887; that he dissolved partnership with his brother in 1885 in a general business embracing saw mill, store, etc., that in the settlement Wm. took a relinquishment from John of his right to lots 2-7-10-15 and received a warrantee deed from the company to said lots July 30, 1887, he having paid to said company the sum of $1249.28 for said 8 lots; that he has always been recognized as the lawful owner of said land by his neighbors with one or two exceptions until it was learned that the indemnity land of the N. P. R. R. Co. was in dispute; the evidence further shows that Jacob Slaght the applicant under the homestead law herein applied to said Powers to rent Powers' house on one of said lots in March 1883 or '4; that they agreed upon a monthly rent of two dollars per month to be paid to said Powers for said house as rent; that said Slaght did in more ways than one pay to said Powers or through some one else to him said rent for several months; that he suddenly learned that said land could be claimed as government land after the promulgation of Guilford Miller decision and without paying rent any further offered his application for lots 10-11-14-15 Sec 1, Tp. 16 N. R. 45 E., showing that he has resided thereon.

The N. P. R. R. Company set up a claim to said land under its withdrawal and selection as indemnity.

Said land appears now to be covered in part by the town
213 of Palouse City; that there are streets laid out thereon and houses built thereon, that the parties who laid out said town based their right upon the title acquired as they believed from the said N. P. R. R. Co.

The first point that presents itself in this case seems to be the question as to whether said land passed to the railroad company under its grant as indemnity or whether it is now government land subject to entry.

The second point is, which of the parties interested herein as settlers and claimants is entitled to said land.

We find that said land was excepted from the operation of the maps of definite location of Oct. 4, 1880, and from the operation of the selection by said company Dec. 17, 1883 by the settlement of W. L. Powers said settlement has been continuous since 1878 to the present and for this reason under the Guilford Miller decision (7 L. D. page 100) the land must be held as government land at this date.

As to the second point it is clearly shown by the testimony that Slaght settled on said land as the tenant of Powers; that he occupied a house on the land owned by Powers. By this occupation of the premises he could gain no rights as against his landlord for it is a well settled principle of law which has always been recognized by the land department that a tenant cannot dispute his landlord's title.

We are of the opinion that this land should be held as government land subject to right of said Powers to purchase said land, from the government under the 5th section of the act of March

3, 1887, or the act of January 13, 1881, as it appears said Powers holds a warrantee deed from the said N. P. R. R. Co. to said land.

R. GUICHARD, *Register.*
DAVID J. WILCOX, *Receiver.*

June 5, 1889.

X.

That thereafter the said Northern Pacific Railroad Company appealed from said decision to the commissioner of the general land office and th- said Jacob Slaght also appealed from that part of said decision adverse to him; and on the 13th day of April, 1895, said commissioner made and entered his decision in said contest in the words and figures set forth in plaintiff's reply herein.

214 XI.

That thereafter the said defendant Northern Pacific Railroad Company appealed from said decision of the commissioner of the general land office to the secretary of the interior and that thereafter said secretary of the interior on the 20th day of May, 1896, made and entered his decision in the words and figures following, to-wit:

Vol. 22, No. 948.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 20, 1896.

NORTHERN PACIFIC R. R. CO.
vs.
JACOB SLAGHT.

Cancellation of Selections. Decision of April 13, 1895, Affirmed.

The Commissioner of the General Land Office:

SIR: The Northern Pacific Railroad Company appeals from your office decision of April 13, 1895, cancelling their selection of lots 10, 11, 14 and 15 Sec. 1, Tp. 16 N. R. 45 E. Walla Walla Land district, Washington.

The facts are sufficiently stated in your said office decision and having considered the evidence and the assignments of error I find no cause for reversing or modifying said decision and the same is accordingly affirmed.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*"

And on the 20th day of April, 1897, there was made, executed and delivered to Jacob Slaght letters patent under the great seal of the United States, describing therein said lots 10, 11, 14 and 15, section 1, township 16 North, of Range 45, East of the Wilamette Meridian, which letters patent is in words and figures following to-wit:

THE UNITED STATES OF AMERICA.

Homestead Certificate No. 2679. Application 5767.

To all to whom these presents shall come, Greeting:

215 Whereas, there has been deposited in the general land office of the United States, a certificate of the register of the land office at Walla Walla, Washington, whereby it appears that, pursuant to the act of Congress approved 20th of May, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Jacob Slaght has been established and duly consummated, in conformity to law for the lots numbered ten, eleven, fourteen and fifteen section one, township sixteen, north of range forty five, east of the Willamette Meridian, in Washington, containing one hundred and sixty acres, according to the official plat of the survey of the said lands returned to the general land office by the surveyor general.

Now know ye, that there is therefore granted by the United States unto the said Jacob Slaght the tract of land above described.

To have and to hold, the said tract of land with the appurtenances thereof unto the said Jacob Slaght, and to his heirs and assigns forever subject to any vested and accrued water right for mining, agricultural, manufacturing or other purposes, and the rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted as provided by law.

In testimony, I, William McKinley, President of the United States, have caused these letters to be made patent and the seal of the general land office to be hereunto affixed.

Given under my hand at the city of Washington, on the fourteenth day of April, in the year of our Lord one thousand eight hundred and ninety seven, and of the independence of the United States the one hundred and twenty first.

By the President,

WILLIAM McKINLEY,
By M. McKEAN, *Secretary.*

Recorded Vol. 6A, Page 248.
[SEAL.]

216 Received and recorded the 4th day of May, 1897, at 8:50 o'clock A. M. at the request of Jacob Slaght.

JOHN TOBIN,
County Auditor.

XII.

That said Spokane and Palouse Railway Company constructed and completed a railroad upon, over and across said government lots ten and eleven during the year 1886 and the first half of the

year 1887, and that prior to the construction of said railroad survey of said road had been made and staked out over and across said premises, and the road so constructed conformed to the survey so made and staked out as aforesaid, and from and after the completion of said railroad it was operated daily and continuously in the carrying of freight, passengers and United States mail, and that Exhibit A attached to the answers herein shows the line of said road as staked out, located, constructed and operated as aforesaid.

XIII.

That in the construction of said railroad which runs from Spokane, Washington, to Lewiston, Idaho, said Spokane and Palouse Railway Company expended a large sum of money, and was at a great expense in so doing.

XIV.

That at the time of the construction of said railroad, the plaintiff resided upon said land, and in a house located at a point within fifteen feet of the rail of the main line, and at a point about 50 feet west of the government lots nine and ten in said section one, and by observation knew that the said road was being constructed and that large sums of money were being expended and paid out on account of said road, and that said railroad was being constructed for carrying freight and passengers thereon and thereover, and knew that the Spokane and Palouse Railway Company then and thereafter claimed a right of way one hundred (100) feet wide on either side of said main line, and knew of the making and marking of the survey so made as aforesaid.

217 XV.

That at the time when the surveyors first entered upon said land for the purpose of surveying and locating said railroad, the plaintiff published in the Palouse News, a weekly newspaper printed and published at Palouse City, Washington, a notice as follows: "Notice is hereby given to all persons whomsoever not to trespass on my homestead claim which is: Lots 10, 11, 14 and 15, Sec. 1, Tp. 16, N. R. 45, E. W. M. Whitman County, W. T., Signed Jacob Slaght," which was the only notice or formal objection which the plaintiff made to the construction of said railroad.

XVI.

That in August, 1887, the said Northern Pacific Railroad Company, claiming to be the owner of said lots 10 and 11, sold and conveyed the same by deed of conveyance, containing the usual covenants and warranties, to William L. Powers, and that afterwards on the 14th day of September, 1887, the said William L. Powers and wife conveyed by deed of conveyance to the Spokane and Palouse Railway Company a tract of land for a right of way 200 feet wide, being the land shown and marked in defendants' Exhibit A in

their answer, as the tract occupied by the defendant Northern Pacific Railway Company, as its right of way.

XVII.

That on the 12th day of May, 1897, said Spokane and Palouse Railway Company, W. L. Powers, Hattie Dean, Edward Dean, F. S. Bell, Ivan Chase, J. K. McCornack, Ann J. Clyde, J. R. Mahern, Spokane & Palouse Land Company, a corporation, Palouse Mill Company, a corporation, and A. F. Pugh, who were the grantees of the said William L. Powers, filed in the superior court of Whitman county, Washington, their complaint against the said Jacob Slaght, for the purpose of having the said Jacob Slaght declared a trustee and as holding said land in trust for the plaintiff and directing a conveyance from him to the plaintiffs and enjoining the said Jacob Slaght from bringing any action to oust the defendants, and subsequently they filed a second amended complaint which amended complaint and prayer are fully set forth in plaintiff's reply herein.

218 XVIII.

That the said Jacob Slaght demurred to said amended complaint, and said demurrer was by the court sustained, the order sustaining said demurrer being set out in plaintiff's reply herein.

XIX.

That thereafter and on to-wit, the 24th day of June, 1898, the plaintiff in said action appealed from said order and final judgment sustaining the said demurrer to the complaint, to the supreme court of the state of Washington, and that thereafter on the 14th day of January, 1899, the supreme court of the state of Washington made and entered its judgment in said cause in the words and figures set out in plaintiff's reply herein.

XX.

That thereafter the said plaintiffs took said cause to the supreme court of the United States on a writ of error, and the said supreme court of the United States having considered the same, on the 14th day of January, 1899, affirmed the said judgment of the said supreme court of the state of Washington as aforesaid.

XXI.

That after the said Jacob Slaght and Margaret A. Slaght were divorced as aforesaid, and on to-wit the 27th day of July, 1901, the said Margaret A. Slaght executed and delivered a warranty deed in the usual form to said Jacob Slaght, in which deed the land described in the plaintiff's complaint was included, set out and described therein and stated that the property described in said deed was to be his separate and sole property, and the said Margaret A. Slaght did not, nor did the said Jacob Slaght make any transfer or

conveyance of any kind, of any portion of said government lots 10 and 11 except as aforesaid prior to the 23rd day of February, 1901, unless the facts herein stated and stipulated constitute a transfer or conveyance.

XXII.

That on the 21st day of February, 1899, the Spokane and Palouse Railway Company, conveyed all of its right, title, interest and estate in and to the right of way over and across lots 10 and 11,
219 section 1, as aforesaid, together with all its property to the defendant Northern Pacific Railway Company, and that ever since then the said Northern Pacific Railway Company has maintained and operated said road in the carrying of freight, passengers and United States mail from Spokane, Washington, to Lewiston, Idaho, and intervening points.

XXIII.

That on the 21st day of February, 1899, when the said Spokane & Palouse Railway Company transferred and conveyed its interest in and to the right of way over and across lots 10 and 11 as aforesaid, to the defendant the Northern Pacific Railway Company, the said Spokane & Palouse Railway Company had not, nor had the Northern Pacific Railway Company acquired from plaintiff by deed, grant or conveyance of any kind, unless the facts herein stipulated amount thereto, nor had the Spokane & Palouse Railway Company nor the Northern Pacific Railway Company acquired by condemnation proceedings against plaintiff, any right over and across said land, and the said defendant Northern Pacific Railway Company has not since said date received from plaintiff any deed, grant or conveyance of any kind, other than the facts herein shown, nor has it acquired any right to the lands described in the complaint by condemnation proceedings against plaintiff for right of way over and across said lands.

XXIV.

That the plaintiff was not asked for nor did he give his consent (unless the facts herein stipulated show such consent) to the location, construction or erection of said railroad over and across said lots at the place where the same was located, or at any other place, over and across said lots, nor did the plaintiff make any formal protest or objection to the construction of said road, other than said notice contained in said notice published in the paper as aforesaid and in the proceedings in the United States land office, and in the state and federal courts as herein set forth.

XXV.

That without any objection on the part of plaintiff (other than the publication of said notice) there has been constructed
220 upon said right of way on the premises in controversy valuable and lasting improvements in the shape of railroad

bridges, water tank and warehouses, which would be practically of no value should the road and right of way of defendant Northern Pacific Railway Company be changed from the premises in controversy.

That it would be a great expense to defendant, the Northern Pacific Railway Company, to change its line of road and right of way over the premises in controversy, and that some of the improvements of said road consisting of bridges and water tank and embankments would be of no practical value, should the road or right of way be changed from the premises in controversy.

XXVI.

That the defendant, Northern Pacific Railway Company, does not claim any part or portion of lots 10 and 11, section 1, as aforesaid except a strip 200 feet wide, being 100 feet on each side of the ceter of the said road over and across said lots, as the same is now constructed, shown and designated on the plat marked Exhibit A and attached to the answer herein.

XXVII.

That the defendants John Miller and Anna Miller, his wife, and the Washington Grain and Milling Company, a corporation, are the owners of and operating warehouses situated, designated and located on said plat marked Exhibit A of defendants' answer, said warehouses having been constructed and erected on said land under a grant or lease of premises from the said Northern Pacific Railway Company, or its grantor the Spokane and Palouse Railway Company, but without permission of the plaintiff herein (unless the facts herein stipulated show such consent).

XXVIII.

That the builders of said warehouses knew, and the Spokane & Palouse Railway Company knew, or could have known had they made inquiry, that the question to the title to said land, and that portion thereof claimed by the said Northern Pacific Railway Company was in controversy in the land department of the United States undecided and undetermined as in the manner and at the time and date hereinbefore set forth.

221 XXIX.

That the said warehouse now occupied by John A. Miller was partially built in 1892 by C. H. Farnsworth and J. T. Waters, and prior to the construction thereof the plaintiff notified the said Farnsworth and Waters not to contsruct said warehouse on said land; and also stated to them that said land belonged to plaintiff, and the right thereto was in contest and pending in the United States land office undetermined. That said Miller has built additions to said warehouse.

XXX.

That during the time that all of said warehouses were being constructed the plaintiff was residing upon said government lots 10 and 11, section 1, as aforesaid, and on that portion thereof as set forth in paragraph XIV, now claimed by the defendant Northern Pacific Railway Company as its right of way.

XXXI.

That no suit or action was brought by plaintiff to prevent or restrain the erection, construction, or maintenance on the premises in controversy of the said railroad or any of said warehouses, nor to procure the possession thereof or damage for the retention of the same prior to the commencement of this action, and that this action was commenced within a few months and as soon as practicable after the decision of the supreme court of the United States, affirming the decision of the supreme court of the state of Washington.

XXXII.

That said township sixteen north, of range forty-five east, was surveyed by the United States in the year 1874 and a plat thereof duly approved was filed in the district land office at Walla Walla, Washington territory, on the 2nd day of April, in the year 18-5, and said government lots 10, 11, 14 and 15 were at the date of filing said plat and survey, and thereafter remained, except for the claims of said Jacob Slaght and the Spokane & Palouse Railway Company, public lands of the United States not reserved.

XXXIII.

That the defendants herein other than the Northern Pacific Railway Company are tenants of said railway company, and have and hold possession of portions of the premises described in the complaint only as such lessees for a short period of time, and as warehousemen and have warehouses erected on the parts thereof leased to them, and they receive and accept as warehousemen all grain tendered to them to the extent of their capacity, for shipment over the line of the Northern Pacific Railway Company.

222 XXXIV.

That it would be possible for the defendant Northern Pacific Railway Company to carry freight, passengers and U. S. mail from Spokane, to and from Lewiston, Idaho, through Palouse, Washington, on or over a right of way across plaintiff's land, not exceeding 25 feet wide and a space 100 feet square would permit the erection of a depot at Palouse, but great inconvenience would result to the citizens of Palouse and vicinity and to the said railway company if this were all the facilities had by said railway company for receiving and delivering freight and passengers and U. S. mail, that for the convenience, prompt and expeditious receipt and delivery and shipment and hand-

ling of freight and for the erection of warehouses and elevators for the storing of freight and wheat at Palouse, Washington, it is necessary to have in addition to the main track depot switches, turnouts, warehouses, water tanks, elevators, and other structures which require a right of way a space as large as that claimed by the defendant railway company as shown by the exhibit attached to its answer, that is, the whole of the premises in controvercy in this action.

XXXV.

That said town of Palouse is a thriving municipal corporation of the third class, and was organized and incorporated under the laws of the state of Washington, on the 7th day of June, 1889, and the territory included in the limits thereof, at the date of its organization was the following, to-wit:

Commencing at the northeast corner of lot three (3) in section six (6) in township sixteen (16) north of range forty-six east of the Willamette Meridian, in Whitman county, state of Washington, running thence west along the township line one (1) mile to the center line of section one (1) in said township sixteen (16) north of range forty-five (45) east of the Willamette Meridian, running thence south along the center line of section one (1) aforesaid 285 rods, thence running due east parallel with the north boundary line thereof one (1) mile to a point on the east line of southeast quarter (S. E. ¼) of northwest quarter quarter (N. W. ¼) of the said section six (6) aforesaid, running thence north parallel with the west boundary line thereof to the North Palouse river, thence easterly up said
223 river to a point in said river where the east line of Winfield street in Fisher's addition to Palouse City Washington, as shown upon the recorded plat thereof now of record in the auditor's office of Whitman county, Washington, produced south will cross said river, being about 690 feet east of the east line of said lot three (3) in section six (6) aforesaid, running thence north to the center line of Idaho Avenue in said Fisher's addition aforesaid, running thence west along the center line of Idaho Avenue to the east line of lot three (3) in section six (6) in said township sixteen (16) aforesaid, and thence running north to the township line the place of beginning, lying, situated and being in section one (1) in township sixteen (16) and range forty-five (45) E. W. M. aforesaid, and in section six (6) township sixteen (16) range forty-six 46 E. W. M. aforesaid.

XXXVI.

That the land involved in this action is much greater in value now than it was in 1886 or 1887. That said railway company has increased the value thereof to some extent, and there has been a general rise in values of all lands in the vicinity of the land involved in this action.

XXXVII.

This stipulation is not intended to and shall not prevent any party to this action from producing, offering or introducing, upon

the hearing and trial of this cause any testimony or evidence, he it or they, may desire to produce, offer or introduce. providing that the party desiring to produce, offer or introduce such additional testimony, or evidence shall notify the opposite attorney of their intentions, and the point on which such testimony or evidence is to be offered, at least ten days prior to the time when said cause is set for hearing, nor shall this stipulation prevent the court from hearing or receiving any evidence that the said court may deem proper or admissible as to any matter or thing not covered hereby, provided that the opposite party has reasonable notice of the requirement of the court in that particular and time to prepare to meet it by testimony.

224 XXXVIII.

This stipulation shall not preclude or estop either party hereto from excepting to any finding of fact by the trial court founded on any fact or facts agreed to which are irrelevant or immaterial, and either party may except to any finding of fact found by the trial court on the ground that such finding is irrelevant and immaterial, although based upon such fact or facts herein agreed to.

XXXIX.

On the 3rd day of December, 1901, the county commissioners of Whitman county, Washington, by an order entered upon their records and delivered to the county treasurer ordered that all taxes levied and assessed against said government lots 10 and 11, section 1, aforesaid, for the year 1896 and all prior years be cancelled and the same were by said treasurer cancelled upon the tax rolls of said county, and on the 4th day of August, 1902, said board of county commissioners of Whitman county made and entered an order on their records cancelling all the taxes for the years 1897–8–9–1900 and 1901 levied and assessed against lots and blocks in Powers' addition to Palouse contained within said government lots 10 and 11 aforesaid and for said years of 1897–8–9–1900 and 1901, said government lots 10 and 11 have been assessed to Jacob Slaght and Margaret A. Slaght and to their respective grantees without deduction therefor for said right of way. That the defendant Northern Pacific Railway Company and its grantor Spokane & Palouse Railway Company during all of said years and ever since the year 1886 were and have been assessed for state and county taxes on its said road in Whitman county, at the uniform rate of a certain sum per mile for main tracks and certain sum per mile for side tracks, which include the right of way owned or claimed by said company in said county.

It is hereby stipulated that a jury trial be and it is hereby waived. It is further stipulated that this action shall be tried to, by and before the court without a jury.

THOMAS NEILL AND
A. A. WILSON,
Attorneys for Plaintiff.
STEPHENS & BUNN,
Attorneys for Defendants.

225 Thereupon the defendants and each of them offered and the court admitted in evidence a copy of the supplemental articles of incorporation of the Eastern Washington Railway Company and the Spokane and Palouse Railway Company duly certified by the secretary of the state of Washington which said copy and the certificate thereto is in words and figures following, to-wit:

UNITED STATES OF AMERICA, *State of Washington:*

OFFICE OF THE SECRETARY OF STATE.

I, Sam H. Nichols, Secretary of State of the state of Washington, do hereby certify that I have carefully compared the annexed copy of the Supplemental Articles of Incorporation of the "Eastern Washington Railway Company" changing corporate name to "Spokane and Palouse Railway Company," with the original supplemental articles, as filed and of record in this office on the first day of March, A. D. 1886 at page 379 book "G", and find the same to be a true and perfect copy thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the state of Washington.

Done at Olympia this ninth day of May, in the year of our Lord 1902.

SAM H. NICHOLS,
Secretary of State.

[SEAL.]

Supplemental Articles of Incorporation of the Eastern Washington Railway Company.

Know all men by these presents: That we, the undersigned, Thomas F. Oakes, Charles B. Wright, E. J. Brickell, and Watson C. Squire, the corporators of the Eastern Washington Railway Company, a corporation duly organized and existing under the laws of the Territory of Washington, namely, Chapter 185 of the Code of
226 Washington, entitled "Formation of Corporations," and we, the undersigned, the said Thomas F. Oakes, Nelson Bennett, Charles B. Wright, Jr., Anthony M. Cannon, Paul F. Mohr, A. A. Newberry and Joseph Jorgensen, the trustees of said corporation, do by these supplemental articles and in accordance with the provisions of section 2422 of said code, amend the articles of the incorporation of the Eastern Washington Railway Company, in the manner following, that is to say:

Article First is hereby amended so as to read as follows:

First. That the name of said corporation is the "Spokane and Palouse Railway Company."

Article Second is hereby amended so as to read as follows:

Second. The object and purposes for which the said corporation is formed are (1) to build, equip, run and operate a railroad, to be operated by steam, from a point of connection with the main line of Northern Pacific Railroad Company, at or near the town of Marshall, in the county of Spokane, to some eligible point on or near the Snake river, all in the said territory of Washington. (2) to build,

equip, run and operate branch railroads form such points on said railroad to such other points or places in the said territory of Washington, as shall be determined, from time to time by the trustees of the said corporation. (3) to construct, and to maintain and operate, upon the line of the said railroad and branches, telegraph lines, or to contract with telegraph companies for the construction, maintenance and operation of such telegraph lines. (4) to borrow money for the purposes of said corporation on bonds, notes, bills, acceptances or otherwise at such rates of interest and upon such terms, as the trustees of the said corporation shall determine, and to secure the payment of the same by mortgage or mortgages, upon its property, rights, privileges, exemptions, immunities and franchises, or upon any part thereof, or by such other security or securities as the trustees may determine.

In witness whereof, we have hereunto subscribed our names this sixth day of February in the year eighteen hundred and eighty-six in triplicate.

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T. F. OAKES,
C. B. WRIGHT,
E. J. BRICKELL,
Corporators.
WATSON C. SQUIRE,
T. F. OAKES,
NELSON BENNETT,
C. B. WRIGHT, JR.,
ANTHONY M. CANNON,
PAUL F. MOHR,
A. A. NEWBERRY,
JOSEPH JORGENSEN,
Trustees.

In presence of:
L. R. KIDDER,
J. D. SINCLAIR,
As to Anthony M. Cannon, Paul F. Mohr, and Joseph Jorgensen.
WM. G. CLARK,
J. K. STRAM,
As to C. B. Wright and C. B. Wright, Jr.
EDW. WHEELER,
As to W. C. Squire.
E. T. STEVENSON,
FRANCIS T. WEST,
As to T. F. Oakes and Nelson Bennett.
H. E. HOUGHTON,
F. H. GRAVES,
As to E. J. Brickell and A. A. Newberry.

STATE OF NEW YORK, *City and County of New York, ss:*

It is hereby certified that on this sixth day of February, in the year eighteen hundred and sixty-six, at my office in the said city of New

York, before me, a commisioner duly appointed by the governor of the territory of Washington, to take in the state of New York the proof or acknowledgment of deeds and other instruments to be used or recorded in said territory, personally came Anthony M. Cannon, Paul F. Mohr and Joseph Jorgensen, to me personally known, and known to me to be three of the identical persons described in, and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein expressed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal the day and year in this certificate above written.

[COMMISSIONER'S SEAL.] L. R. KIDDER,
Commissioner of Deed- in New York for Territory of Washington.

STATE OF MINNESOTA, *County of Ramsey, ss:*

It is hereby certified that on this 15th day of February, in the year eighteen hundred and eighty-six, before me, a notary
228 public, in and for the county and state aforesaid, at my office in the city of St. Paul in said county, personally came Thomas F. Oakes, to me personally known, and known to me to be the individual described in, and who executed the foregoing instrument, as a corporator and also as a trustee, of the corporation therein mentioned, and acknowledged to me that he executed the same freely and voluntarily, for the uses and purposes therein expressed.

In witness whereof I have hereunto subscribed my name and affixed my official seal the day and year in this certificate above written.

[NOTARIAL SEAL.] E. T. STEVENSON,
Notary Public, Ramsey Co., Minn.

STATE OF MINNESOTA, *County of Ramsey, ss:*

It is hereby certified that on this 15th day of February, in the year eighteen hundred and eighty-six, before me, a notary public in and for the county and state aforesaid, at my office in the city of Saint Paul, in said county, personally came Nelson Bennett, to me personally known, and known to me to be the individual described in, and who executed the foregoing instrument, as a corporator and also as a trustee, of the corporation therein mentioned, and acknowledged to me, that he executed the same freely and voluntarily for the uses and purposes therein expressed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal the day and year in this certificate above written.

[NOTARIAL SEAL.] E. T. STEVENSON,
Notary Public, Ramsey County, Minnesota.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

It is hereby certified that on this ninth day of February, in the year eighteen hundred and eighty-six, at my office in the said city of Philadelphia, before me, a commissioner duly appointed by the governor of the territory of Washington to take in the state of
229 Pennsylvania, the proof of acknowledgment of deeds and other instruments to be used or recorded in said territory, personally came Charles B. Wright and Charles B. Wright, Jr., to me personally known and known to me to be two of the individuals described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein expressed.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal the day and year in this certificate above written.

[COMMISSIONER'S SEAL.] WM. G. CLARK,
Commissioner of Deeds, etc., for the Territory of Washington, in Philadelphia, Pa.

TERRITORY OF WASHINGTON, *County of Spokane, ss:*

It is hereby certified that on this twenty-third day of February, A. D. 1886, at my office, before me, a notary Public, in and for the territory of Washington duly appointed by the governor thereof, personally came E. J. Brickell and A. A. Newberry, to me personally known, and known by me to be two of the persons described in and who executed the foregoing instrument, the said E. J. Brickell as corporator and the said A. A. Newberry as trustee, and they severally acknowledged that they executed the same freely and voluntarily as aforesaid for the uses and purposes therein set forth.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal the day and year in this certificate above written.

[NOTARIAL SEAL.] FRANK H. GRAVES,
Notary Public, Wash. Ter.

(Endorsed:) Filed in the office of the secretary of the territory of Washington, March 1, 1886 and recorded March 11, 1886 on pages 379 to 383 of Book "G." N. H. Owings, Secretary.

230 That thereupon the defendants and each of them offered and the court admitted in evidence a copy of the amended supplemental articles of incorporation of the Spokane & Palouse Railway Company, duly certified by the secretary of state of the state of Washington, and said copy and certificate thereto is in the words and figures following to wit:

UNITED STATES OF AMERICA, *State of Washington:*

OFFICE OF THE SECRETARY OF STATE.

I, Sam H. Nichols, Secretary of State of the state of Washington, do hereby certify that I have carefully compared the annexed copy of the Supplemental Articles of Incorporation of the "Spokane and Palouse Railway Company," (adding an additional clause to the objects) with the original supplemental articles, as filed and of record in this office on the 13th day of June, A. D. 1887, at page 560, book "A" and find the same to be a true and perfect copy thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the state of Washington.

Done at Olympia, this ninth day of May, in the year of our Lord 1902.

SAM H. NICHOLS,
Secretary of State.

[SEAL.]

Supplemental Articles of Incorporation of the Spokane and Palouse Railway Company.

Know all men by these presents, That we, the undersigned, a majority of the trustees of the Spokane and Palouse Railway Company, A. M. Cannon, A. A. Newberry, Paul F. Mohr and F. P. Weymouth, residents of Washington Territory, duly authorized thereto by the stockholders and trustees of the Spokane and Palouse Railway Company, do hereby make, execute and file supplemental articles of incorporation as follows, to-wit: Article II of the Articles of Incorporation of the said Spokane and Palouse Railway Company is
231 hereby amended by adding thereto as follows:

(5) That said Spokane and Palouse Railway Company is hereby authorized to build, equip, maintain, run and operate railroads and telegraph lines from any place or places in Washington Territory on the line of the Spokane and Palouse Railway Company's railroad as now, or as the same shall hereafter be constructed, by any route or routes, to any place or places on the Clearwater river, in Idaho Territory, or any other place or places in Idaho Territory, or Montana Territory, as shall be determined from time to time by the trustees of the said corporation.

In witness whereof we have hereunto subscribed our names and affixed our seals this 28th day of May, in the year of our Lord one thousand eight hundred and eighty-seven, in triplicate.

A. M. CANNON. [SEAL.]
PAUL F. MOHR. [SEAL.]
A. A. NEWBERRY. [SEAL.]
F. P. WEYMOUTH. [SEAL.]

In the presence of:
T. H. MOSS.
THEO. REED.
L. G. JACKSON.

TERRITORY OF WASHINGTON, *County of Spokane, ss:*

Be it remembered that on this 28th day of May, A. D. 1887 before me, the undersigned, a notary Public in and for said county and territory, personally appeared the within named A. M. Cannon, Paul F. Mohr, A. A. Newberry, F. P. Weymouth, who are known to me to be the identical persons who executed the foregoing instrument and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal this 28th day of May, A. D. 1887.

HORACE E. HOUGHTON,
[NOTARIAL SEAL.] *Notary Public, Wash. Ter.*

(Endorsed:) Filed in the office of the Secretary of Territory of Washington 13 June, 1887. Recorded 13-June, 1887, Book A, page 560. N. H. Owings, Secretary.

232 That thereupon the defendants and each of them and the court admitted offered in evidence a copy of a certificate of a resolution of the board of trustees of the Spokane & Palouse Railway Company, duly certified by the secretary of state of the State of Washington, which copy and the certificate thereto, is in the words and figures following to wit:

UNITED STATES OF AMERICA, *State of Washington:*

OFFICE OF THE SECRETARY OF STATE.

I, Sam H. Nichols, Secretary of State of the state of Washington, do hereby certify that I have carefully compared the annexed copy of the certificate of the resolution of the board of trustees of the "Spokane and Palouse Railway Company," (to construct a branch line of road in the state of Washington), with the original certificate of resolution, as filed and of record in this office on the 21st day of June, A. D. 1898, at page 560, book 16 Domestic Corporations, and find the same to be a true and perfect copy thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the state of Washington.

Done at Olympia, this ninth day of May, in the year of our Lord 1902.

SAM H. NICHOLS,
[SEAL.] *Secretary of State.*

TACOMA, WASH., *June* 11, *A. D.* 1898.

A special meeting of the board of trustees of the Spokane & Palouse Railway Company was held at the office of said company in the city of Tacoma, Pierce county, Washington, at the hour of ten o'clock A. M. on Saturday, the 11th day of June, 1898, pursuant to the call therefor duly issued by the assistant secretary, S. J. Maxwell, under direction of the president, which said call was served upon each trustee of said company, naming the time, place and object of said

meeting. And at said meeting there were present the following
233 trustees, viz., W. G. Pearce, Thomas Cooper, S. J. Maxwell and C. H. Knapp, being and constituting a majority of the board of trustees of said corporation. Each of said trustees present admitted due notice of the time and place of the holding of said meeting, and due proof was presented and filed showing due notice served upon each of the trustees of said corporation of the time and place of the holding and the object of said meeting.

The meeting was called to order by W. G. Pearce, vice-president, who presided.

The call for the special meeting of said trustees was read and presented, and the chairman announced and declared the meeting open for the transaction of business, whereupon the following resolution was presented by Thomas Cooper:

"Be it resolved by the board of trustees of the Spokane and Palouse Railway Company, a corporation duly organized and existing under and by virtue of the laws of the state of Washington, and engaged in the construction and operation of railroads in the states of Washington and Idaho, as follows:

That the Spokane & Palouse Railway Company, through its board of trustees, does hereby declare its intention to construct and operate a branch line of railroad in the state of Washington, and hereby designates the route of said proposed branch of road as follows, viz., The said branch line of railroad to be constructed is to start at a point on the Spokane and Palouse Railroad at or near Pullman Whitman county, in the state of Washington, and extend in a general westerly direction to a point at or near La Crosse, in said Whitman county, thence in the same westerly direction to Washtucna, in the county of Adams, in said state of Washington, and thence to Connell, on the main line of the Northern Pacific Railway, in Franklin County in said state, a distance of about ninety (90) miles, more or less. And also hereby declares its intention to construct and operate a branch road from a convenient point on said line above described to Colfax, in a generally northerly direction, said Colfax being situated in Whitman county, state of Washington, and the said road to be about ten (10) miles in length.

234 It is further resolved and declared that it is the intention of the said Spokane & Palouse Railway Company to construct and complete the construction of said branch lines of railroad from the points above described, together with a line of telegraph and necessary and proper side tracks, stations, station platforms and other appurtenances necessary to be used in connection with the construction and operation of said railroad. And the president and secretary of the Spokane & Palouse Railway Company are hereby directed and authorized to file a copy of this record, certified by them in their official capacity in the office of the secretary of the state of Washington, and have the same recorded."

The foregoing resolution was adopted by the following vote: Aye, W. G. Pearce; Thomas Cooper; C. H. Knapp; S. J. Maxwell. No,

none; being the unanimous vote of all trustess present in favor of said resolution.

W. G. PEARCE,
Vice-President.

Attest:
S. J. MAXWELL,
Assistant Secretary.

STATE OF WASHINGTON, *County of Pierce, ss:*

I, S. J. Maxwell, do hereby certify and declare that I am and on June 11th, A. D. 1898, was the assistant secretary of the Spokane & Palouse Railway Company, and as such was present at the special meeting of the board of trustees of said corporation held on the 11th day of June, A. D. 1898, and that the foregoing is a full, true, and correct copy of the minutes and resolutions of the Spokane & Palouse Railway Company adopted at the special meeting of the board of trustees of said Spokane & Palouse Railway Company held at the office of said company in the city of Tacoma, Pierce county, Washington, on the 11th day of June, A. D. 1898, as the same appear of record on the books of said corporation. And I further certify that I am the custodian of said books, and have compared said resolutions and minutes with the original record, and the same is a full, true and correct copy.

In witness whereof, I have hereunto set my hand and
235 affixed the seal of said corporation the day and year in this certificate first above written.

S. J. MAXWELL,
Assistant Secretary.

[CORPORATE SEAL.]

STATE OF MINNESOTA, *County of Ramsey, ss:*

The undersigned, respectively president and secretary of the Spokane & Palouse Railway Company, a railroad corporation, organized and existing under and by virtue of the laws of the state of Washington and having its principal place of business at Tacoma, in said state, do hereby certify and declare that the foregoing is a true copy of the minutes of a special meeting of the board of trustees of said Spokane & Palouse Railway Company held at the office of said company in the city of Tacoma, Pierce county, state of Washington, on June 11th, A. D. 1898, commencing at the hour of 10 o'clock A. M. of said day, and that the same is a full, true and correct transcript of the record of the proceedings of said meeting.

This certificate is made in pursuance of the provisions of an act of the legislature of the state of Washington.

[CORPORATE SEAL.] C. S. MELLEN, *President.*

Attest:
W. H. GEMMELL, *Secretary.*

(Endorsed:) Filed for record in the office of the secretary of state, June 21, 1898, and recorded in Book 16, page 560, Domestic Corporations. Will D. Jenkins, Secretary of State.

Thereupon the defendants and each of them offered and the court admitted in evidence a copy of the articles of incorporation and proof of organization thereunder of the Spokane and Palouse Railway Company, with the endorsements thereon, filed in the office of the secretary of the interior of the United States, and approved by him on May 11, 1886, all certified by the commissioner of the
236 general land office, which said copy of said articles and said proof of organization is in words and figures following, to-wit:

M. L. 122601. W. P. J.

4—207*a*.

F.
J. McK.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec.* 28, 1901.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed tracing and copies of papers are true and literal exemplifications of a part of map of definite location and of papers relative to the incorporation and organization of the Spokane and Palouse Railway Company on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

[SEAL.]

BINGER HERMANN,
Commissioner of General Land Office.

The Spokane and Palouse Railway Co.

Construction Department.

SPOKANE FALLS, W. T., *April 6th*, 1886.

The Hon. L. Q. C. Lamar, Secretary of the Interior, Washington, D. C.

DEAR SIR: Please find enclosed:

1. A copy of the articles of incorporation of "The Eastern Washington Railway Company."

2. A copy of the supplemental articles of incorporation, changing the name to that of the "Spokane and Palouse Railway Company."

3. A copy of the territorial law under which this company was organized, with the certificate of the secretary of Washington
237 territory that the same is correct.

4. The certificate of the secretary of the territory relating to the filing of both the original "Articles of Incorporation," and the "Supplemental Articles of Incorporation."

5. The official statement of the secretary of this company that the organization has been completed, and that the company is fully authorized to proceed with the construction of the road, etc.

6. A true list, showing the names and designations of the respective officers of the company at the date of the proof at the department.

7. Map of the location of the line of the Spokane and Palouse

Railway Company with the requisite certificates of "due proofs" and verification of the aforesaid map.

Yours respectfully, A. M. CANNON,
Pres. Spokane and Palouse Railway Company.

Dictated.

A. M.

Spokane Falls, Wash. Ty., Apr. 6/86.
Cannon, A. M.
Encloses copy of articles of incorporation and due proofs, also map of Eastern Wash. Ry. Co. now Spokane and Palouse Ry. Co. as per amended articles enclosed.
2888. Department of the Interior, L. and R. R. Div. Received Apr. 14, 1886.

DEP'T OF THE INTERIOR, *May* 3/86.

Respectfully referred to Com. Gen. Land Office who will inform the Company that the papers are in proper form and are satisfactory to the Department.
Map referred for report.

G. A. JENKS,
Ass't Secretary.

May 11, 1886, Cannon advised that due proofs are satisfactory.
File with right of way papers.

REED.

Papers ret'd for completion Ap'l 14/86. 4 En.

238 The Spokane and Palouse Railway Co.

Construction Department.

SPOKANE FALLS, W. T., *April 26th,* 1886.

The Hon. G. A. Jenks, Assistant Secretary, Dep't Interior, Washington, D. C.

DEAR SIR: Referring to your communication 2888 to our Mr. Cannon, I beg to hand you, herewith, copies of the articles of incorporation, and the supplemental articles of incorporation of the Spokane and Palouse Railway, corrected in accordance with the instructions contained in your circular forwarded us.

Yours very truly, A. A. NEWBERY, *Secretary.*

Dictated.

3456. Department of the Interior, General Land Office. 50501. May 7, 1881.
Received May 3, 1886.

SPOKANE FALLS, WASH. TY., *Apr.* 26/86.

Newbery, A. A.,
Returns corrected, articles of incorporation and due proof of Spokane and Palouse Ry. Co.

No answer required.
File with right of way papers.

REED.

File with 2888.
17/384 M. F.

239 UNITED STATES OF AMERICA, *Territory of Washington:*

OFFICE OF THE SECRETARY.

I, N. H. Owings, Secretary of the Territory of Washington, and custodian of the Great Seal, do hereby certify that I have carefully compared the annexed copies of writing: to wit: an act entitled "Formation of Corporations" the same appearing as chapter 185, in the Code of Washington Territory; also an Act entitled "An act to amend Section 2474 of chapter 188 of the Code of Washington, relating to condemning and appropriating land by private corporations" approved Nov. 28, 1883; the same appearing on pages 35 and 36 of the Session Laws of Washington Territory for 1883 with the originals now on file in my office, and that the same are correct transcripts therefrom and of the whole of said originals.

In testimony whereof I have hereunto set my hand and affixed the Great Seal of said territory, at Olympia, this 3rd day of April, 1886.

[SEAL.]

N. H. OWINGS,
Secretary of the Territory.

Code of Washington.

Formation of Corporations—Chapter CLXXXV.

SEC. 2421.—Corporations, for manufacturing, mining, milling, wharfing and docking, mechanical, mercantile, building and farming purposes, or for the building, equipping and managing water flumes, for the transportation of wood and lumber, or for the purpose of building, equipping and running railroads, or engaging in any other species of trade or business, may be formed according to the provisions of this chapter; such corporations and the members thereof being subject to all the conditions and liabilities herein imposed, and to none others.

SEC. 2422.—Any two or more persons, who may desire to
240 form a company for one or more of the purposes specified in the preceding section, shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgment of deeds, and file one of such articles in the office of the secretary of the territory, and another in the office of the county auditor of the county in which the principal place of business of the company is intended to be located, and retain the third in the possession of the corporation. Said articles shall state the corporate name of the company, the object for which the same shall be formed, the amount of its capital stock, the time of its existence, not to exceed fifty years, the number

of shares of which the capital stock shall consist, the number of trustees and their names, who shall manage the concerns of the company for such length of time (not less than two, nor more than six months) as may be designated in such certificate, and the name of the city, town or locality and county in which the principal place of business of the company is to be located. Amendments may be made to the articles of incorporation, by supplemental articles, executed and filed the same as the original articles.

SEC. 2423.—A copy of any certificate of incorporation filed in pursuance of this chapter and certified by the auditor of the county in which it is filed, or his deputy, or by the secretary of the territory, shall be received in all the courts and places as *prima facie* evidence of the facts therein stated.

SEC. 2424.—When the certificates shall have been filed the persons who shall have signed and acknowledged the same, and their successors, shall be a body corporate and politic in fact and in name, by the name stated in their certificate, and by their corporate name have succession for the period limited, and shall have power:

1. To sue and be sued in any court having competent jurisdiction.

2. To make and use a common seal and to alter the same at pleasure.

3. To purchase, hold, mortgage, sell and convey real and personal property.

4. To appoint such officers, agents, and servants as the
241 business of the corporation shall require; to define their powers, prescribe their duties, and fix their compensation.

5. To require of them such security as may be thought proper for the fulfillment of their duties, and to remove them at will, except that no trustee shall be removed from office unless by a vote of two thirds of the stockholders as hereinafter provided.

6. To make By-laws not inconsistent with the organic act of this territory, and the laws of the congress of the United States, and of this territory.

7. The management of its property, the regulation of its affairs, the transfer of its stock, and for carrying on all kinds of business within the objects and purposes of the company, as expressed in the Articles of Incorporation.

SEC. 2425.—The corporate powers of the corporation shall be exercised by a board of not less than two trustees, who shall be stockholders in the company, and a majority of them citizens of the United States and residents of this territory, who shall, before entering upon the duties of their office, respectively take and subscribe to an oath, as prescribed by the laws of this territory, and who shall after the expiration of the term of the trustees first elected, be actually elected by the stockholders, at such time and place within this territory, and upon such notice and in such manner as shall be directed by the by-laws of the company; but all elections shall be by ballot, and each stockholder, either in person or by proxy, shall be entitled to as many votes as he may own or represent by proxy shares of stock, and the person or persons, receiving the greatest number of votes shall be trustee or trustees: provided, that nothing herein con-

tained shall prevent any corporation by their by-laws limiting such *bona fide* shareholder to a single vote, or one vote for every full share of paid up stock, or its equivalent in assessible stock, disregarding the number of shares he may own. It shall be competent at any time for two-thirds of the stockholders of any corporation organized under this chapter to expel any trustee from office and to elect another to succeed him. In all cases where a meeting of the
242 stockholders is called for the purpose of expelling a trustee and electing his successor, such notice shall be given of the meeting as the by-laws of the company may require. Whenever any vacancy shall happen among the trustees by death, resignation or otherwise, except by removal, and the election of his successor as herein provided, it shall be filled by appointment of the board of trustees.

SEC. 2426.—If it shall happen at any time that an election of trustees shall not be made on the day designated by the by-laws of the company the corporation shall not for that reason be dissolved; but it shall be lawful on any other day to hold an election for trustees, in such a manner as shall be provided for in the by-laws of the company, and all acts of the trustees shall be valid and binding upon the company until their successors are elected and qualified.

SEC. 2427.—A majority of the whole number of trustees shall form a board for the transaction of business and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act.

SEC. 2428.—The first meeting of the trustees shall be called by a notice signed by one or more persons named as trustees in the certificate, setting forth the time and place of the meeting, which notice shall be delivered personally to each trustee, or published at least twenty days in some newspaper in the county in which the principal place of business of the corporation, or if no newspaper is published in the county, then in some newspaper nearest thereto in the territory.

SEC. 2429.—The stock of the company shall be deemed personal estate, and shall be transferable in such manner as shall be prescribed by the by-laws of the company; but no transfer shall be valid except between the parties thereto, until the same shall have been entered upon the books of the company, so as to show the names of the parties, by and to whom transferred, the numbers and designation of the shares and the date of the transfer.

SEC. 2430.—The stockholders of any corporation formed under this chapter may in the by-laws of the company prescribe the
243 times, manner and amounts in which payments of the sums subscribed by them respectively shall be made; but in case the same shall not be so prescribed, the trustees shall have the power to remand and call in from the stockholders the sums by them subscribed, at such time and in such manner, payments or installments, as they may deem proper. In all cases notice of each assessment shall be given to the stockholders personally, or by publication in some newspaper published in the county in which the principal place of business of the company is located, and if none be pub-

lished in such county, then in the newspapers nearest to said principal place of business in the territory. If after such notice has been given, any stockholder shall make default in the payment of assessments upon the shares held by him, so many of said shares may be sold as will be necessary for the payment of the assessment upon all the shares held by him, her or them. The sale of said shares shall be made as prescribed in the by-laws of the company, but shall in no case be made at the office of the company. No sale shall be made except at public auction, to the highest bidder, after a notice of four weeks, published as above directed in this section, and at such sale the person who shall pay the assessment so due, together with the expenses of advertising and sale for the smallest number of shares or portion of a share as the case may be, shall be deemed the highest bidder.

SEC. 2431.—Whenever any stock is held by a person as executor, administrator, guardian or trustee, he shall represent such stock at all meetings of the company, and may vote accordingly as a stockholder.

SEC. 2432.—Any stockholder may pledge his stock by a delivery of the certificate or other evidence of his interest, but may, nevertheless, represent the same at all meetings and vote as a stockholder.

SEC. 2433.—It shall not be lawful for the trustees to make any dividend except from the net profits arising from the business of the corporation, nor divide, withdraw, or in any way pay to the stockholders, or any of them, any part of the capital stock of the company, nor to reduce the capital stock of the company unless in the manner prescribed in this chapter, or the articles of incorporation, or by-laws; and in case of any violation of the provisions of this
244 section, the trustees under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the board of trustees at the time, or were not present when the same did happen, shall in their individual or private capacities, be jointly or severally liable to the corporation and the creditors thereof in the event of its dissolution, to the full amount so divided, or reduced, or paid out; provided this section shall not be construed to prevent a division and distribution of the capital stock of the company which shall remain after the payment of all its debts upon the dissolution of the corporation or the expiration of its charter.

SEC. 2434.—No corporation organized under this chapter shall, by any implication or construction, be deemed to possess the power of issuing bills, notes or other evidences of debt for circulation as money, except bonds by railroad companies, which shall at no time exceed double the amount of paid up stock issued by said company. Each and every stockholder shall be personally liable to the creditors of the company to the amount of what remains unpaid upon his subscription to the capital stock and not otherwise.

SEC. 2435.—No person holding stock as executor, administrator, guardian, or trustee, or holding it as collateral security or in pledge shall be personally subject to any liability as a stockholder of the company; but the person pledging the stock shall be considered as

holding the same, and shall be liable as a stockholder, and the estate and funds in the hands of the executor, administrator, or guardian, or trustee shall be liable in like manner and to the same extent as the testator, or intestate, or the ward or person interested in the trust fund would have been if he or she had been living and competent to act and hold stock in his or her name.

SEC. 2436.—It shall be the duty of the trustees of every company incorporated under this chapter, to keep a book containing the names of all persons, alphabetically arranged, who are or shall be stockholders of the corporation and showing the number of shares of stock held by them respectively, and the time when they be-
245 came the owners of such shares, which book, during the usual business hours of the day, on every day excepting Sunday and the legal holidays, shall be open for the inspection of stockholders and creditors of the company at the office or principal place of business of the company; and any stockholder or creditor of the company shall have the right to make extract from such book, or to demand and receive from the clerk or other officer having the charge of such book, a certified copy of any entry therein, or to demand and receive from any clerk or officer a certified copy of any paper placed on file in the office of the company, and such book and certified copy shall be presumptive evidence of the fact therein stated in any action or proceeding against the company or any one or more of the stockholders.

SEC. 2437.—If at any time the clerk or other officer having charge of such book shall make any false entry or neglect to make any proper entry therein, or having the charge of any papers of the company shall refuse or neglect to exhibit the same or allow the same to be inspected, or extracts to be taken therefrom or to give a certified copy of any entry as provided in the preceding section, he shall be deemed guilty of a misdemeanor and shall forfeit and pay to the injured party a penalty of not less than one hundred dollars, nor more than one thousand dollars and all damages resulting therefrom, to be recovered in any action of debt in any court having competent jurisdiction; and for neglecting to keep such book for inspection as aforesaid, the corporation shall forfeit to the people the sum of one hundred dollars for every day it shall so neglect to be sued for and recovered in the name of the people in the district or probate court of the county in which the principal place of business of the corporation is located.

SEC. 2438.—Any company incorporated under this chapter may, by complying with the provisions herein contained, increase or diminish its capital stock to any amount which may be deemed sufficient and proper for the purposes of the corporation; but before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the sum to which the capital is proposed to be diminished, such
246 amount shall be satisfied and reduced so as not to exceed the diminished amount of the capital.

SEC. 2439.—Whenever it is desired to increase or diminish the amount of the capital stock, a meeting of the stockholders shall be

called by a notice signed by at least a majority of the trustees, and published at least eight weeks in some newspaper published in the county where the principal place of business of the company is located; or if no newspaper is published in the county, then the newspaper nearest thereto in the territory which notice shall specify the object of the meeting, the time and place where it is to be held, and the amount to which it is proposed to increase or diminish the capital and a vote of two-thirds of all the shares of the stock shall be necessary to increase or diminish the amount of capital stock.

SEC. 2440.—If at a meeting so called a sufficient number of votes have been given in favor of increasing or diminishing the amount of the capital, a certificate of the proceedings showing a compliance with these provisions, the amount of capital actually paid in, the whole amount of debts and liabilities of the company, and the amount to which the capital stock is to be increased or diminished shall be made out and signed and verified by the affidavit of the chairman and secretary of the meeting, certified to by a majority of the trustees, and filed as required by Section 2422, and when so filed the capital stock of the corporation shall be increased or diminished to the amount specified in the certificate.

SEC. 2441.—Upon the dissolution of any corporation formed under the provisions of this chapter the trustees at the time of the dissolution shall be trustees of the creditors and stockholders of the corporation dissolved, and shall have full power and authority to sue for and recover the debts and property of the corporation by the names of the trustees of such corporation, collect and pay the outstanding debts, settle all its affairs and divide among the stockholders the money and other property that shall remain after the payment of the debts and necessary expenses.

SEC. 2442.—Any corporation formed under this chapter
247 may dissolve and disincorporate itself by presenting to the district judge of the judicial district in which the office of the company is located, a petition to that effect, accompanied by a certificate of its proper officers and setting forth that at a meeting of the stockholders called for the purpose, it was decided by a vote of two-thirds of all the stockholders to disincorporate and dissolve the corporation. Notice of the application shall then be given by the clerk, which notice shall set forth the nature of the appli-ation, and shall specify the time and place at which it is to be heard, and shall be published in some newspaper of the county once a week for eight weeks, or if no newspaper is published in the county, by publication in the newspaper nearest thereto in the territory. At the time and place appointed, or at any other time to which it may be postponed by the judge he shall proceed to consider the appli-ation, and if satisfied that the corporation has taken necessary preliminary steps and obtained the necessary vote to dissolve itself, and that all claims against the corporation are discharged, he shall enter an order declaring it dissolved.

SEC. 2443.—All corporations now existing or hereafter formed under the laws of other states and territories for the conducting and transaction of marine, life, or fire insurance business, with an

authorized agent residing in and having an office in this territory, shall have ample power to do and transact such insurance business within this territory not inconsistent with the organic act of this territory, with ample power by their corporate name and style to enjoy all such rights not inconsistent with the organic act as aforesaid, and to maintain and defend the same in any court or place within this territory as fully as though said companies were domestic corporations, incorporated by and in accordance with the laws of this territory.

SEC. 2444.—Any corporation desiring at any time to remove its principal place of business into some other county in the territory, shall file in the office of the county auditor a certified copy of its certificate of incorporation. If it is desired to remove its principal place of business to some other city, town, or locality within
248 the same county, publication shall be made of such removal at least once a week for four weeks in the newspaper published nearest to the city, town or locality from which the principal place of business of such corporation is desired to be removed. The formation or corporate acts of any corporation hereafter formed under this chapter shall not be rendered invalid by reason of the fact that its principal place of business may not have been designated in its certificate of incorporation; provided that within three months from the passage of this chapter, such corporation shall cause publication to be made once a week for at least four weeks in the newspaper published nearest the city, town, or locality, and where the principal place of business of such corporation has been in fact located, designating the city, town or locality and county where its principal place of business shall be located. On compliance with the provisions of this section in the several cases herein mentioned, the principal place of business of any corporation shall be deemed established, or removed at or to any designated city, town or locality, and county in the territory.

SEC. 2445.—All persons who have organized themselves as a corporation under the provisions of this chapter for purposes other than those enumerated in Section 2421, are hereby declared incorporate bodies, with all the powers the same as they would enjoy had they been incorporated for the purposes set forth in said Section 2421.

SEC. 2446.—In *in*corporations already formed, or which may hereafter be formed under this chapter, where the amount of the capital stock of such corporation consists of the aggregate valuation of the whole number of feet, shares, or interest in any mining claim in this territory, for the working and development of which such corporation shall be or have been formed, no actual subscription to the capital stock of such corporation shall be necessary; but each owner in said mining claim shall be deemed to have subscribed such an amount to the capital stock of such corporation as under its by-laws will represent the value of so much of his interest in said mining claim, the legal title which he may by deed, deed of trust or other instrument vest, or have vested in such corporation for
249 mining purposes; such subscription to be deemed to have been made on the execution and delivery to such corporation

of such deed, deed of trust, or other instrument; nor shall the validity of any assessment levied by the board of trustees of such corporation be affected by the reason of the fact that the full amount of the capital stock of such corporation, as mentioned in its certificate of incorporation, shall not have been subscribed as provided in this section; provided, that the greater portion of said amount of capital stock shall have been so subscribed: and provided further, that this section shall not be so construed as to prohibit the stockholders of any corporation formed or which may be formed, for mining purposes as provided in this section, from regulating the mode of making subscriptions to its capital stock and calling in the same by by-laws or express contract.

SEC. 2447.—The provisions of this chapter shall extend to and apply to all associations already formed under any law of this territory, or hereafter to be formed under the provisions of this act for the purpose of supplying any cities or towns in this territory, or the inhabitants thereof with pure and fresh water.

SEC. 2448.—Such water companies incorporated for the purpose specified in the preceding section shall have the right to purchase or take possession of and use and hold such lands and waters for the purposes of the company, lying without the limits of the city or town intended to be supplied with water upon making compensation therefor. The mode of proceeding to obtain possession of such lands for the use of the company, right of way laying pipes and aqueducts for the use of the company, when the parties cannot agree shall so far as the same be applicable be as prescribed in chapters 182 and 183.

SEC. 2449.—Water companies hereafter incorporated under the provisions of this chapter must first obtain from the corporate authorities of a city or town intended to be supplied with water the right or privilege so to do; but nothing herein contained shall affect parties now acting under legislative grants or franchises.

An Act to amend Section 2474 of Chapter 188 of the Code of Washington, relating to condemning and appropriating land by
250 private corporations.

SECTION 1. Be it enacted by the legislative assembly of the Territory of Washington: That Section 2474 of the Code of Washington, shall be amended to read as follows:

SECTION 2474. Upon the payment to such justice, for the use of the owners of such lands, or to the owners of such lands, of the damages assessed, by said householders or a majority thereof; said corporation shall have the right to appropriate the land in question to its own use for corporate purposes, subject to the action of the district court in regard to damages as hereafter provided: Provided, that nothing herein contained, shall be construed to prevent such corporation from going upon such lands for the purpose of preliminary surveys and explorations and laying out the road or work: Provided further, that in the condemnation and appropriation of school lands for right of way and railroad purposes, the summons shall be served on the auditor of the county in which the lands to be condemned and appropriated are located; and that the damages arising from such

condemnation and appropriation, shall be paid into the common school fund of said county.

Approved November 28, 1883.

2888 Department of the Interior L. and R. R. Div. Received Apr 14 1886.
2456 Department of the Interior Received May 3 1886.

251 *Supplemental Articles of Incorporation of the Eastern Washington Railway Company.*

Know all men by these presents: That we, the undersigned, Thomas F. Oakes, Charles B. Wright, E. J. Brickell, and Watson C. Squire, the corporators of the Eastern Washington Railway Company, a corporation duly organized and existing under the laws of the Territory of Washington, namely Chapter 185 of the Code of Washington, entitled "Formation of Corporations" and we the undersigned the said Thomas F. Oakes, Nelson Bennett, Charles B. Wright, Jr., Anthony M. Cannon, Paul F. Mohr, A. A. Newbery, and Joseph Jorgensen, the trustees of said corporation, do by these supplemental articles, and in accordance with the provisions of section 2422 of said code, amend the articles of incorporation of the said Eastern Washington Railway Company in the manner following, that is to say:

Article first is hereby amended so as to read as follows:

First.

That the name of said corporation is the "Spokane and Palouse Railway Company."

Article second is hereby amended so as to read as follows:

Second.

The object and purposes for which the said corporation is formed are:

1. To build, equip, run, and operate a railroad to be operated by steam, from a point of connection with the main line of the Northern Pacific Railway Company, at or near the town of Marshall in the county of Spokane, to some eligible point on or near the Snake river, all in said territory of Washington.

2. To build, equip, run and operate branch railroads from such points on said railroad to such other points or places in the said territory of Washington, as shall be determined from time to time by the trustees of the said corporation.

3. To construct and to maintain and operate upon the line
252 of the said railroad and branches, telegraph lines, or to contract with telegraph companies for the construction, maintenance and operation of such telegraph lines.

4. To borrow money for the purposes of the said corporation on bonds, notes, bills, acceptances, or otherwise, at such rates, of interest and upon such terms as the trustees of the said corporation shall de-

termine, and to secure the payment of the same by mortgage or mortgages upon its property, rights, privileges, exemptions, immunities and franchises, or upon any part thereof, or by such other security or securities as the trustees may determine.

In witness whereof, We have hereunto subscribed our names, this sixth day of February, in the year eighteen hundred and eighty-six, in triplicate.

T. F. OAKES,
C. B. WRIGHT,
E. J. BRICKELL,
WATSON C. SQUIRE,
Corporators.

T. F. OAKES,
NELSON BENNETT,
C. B. WRIGHT, JR.,
ANTHONY M. CANNON,
PAUL F. MOHR,
A. A. NEWBERY,
JOSEPH JORGENSEN,
Trustees.

In presence of:
L. R. KIDDER,
J. W. SINCLAIR,
As to Anthony M. Cannon, Paul F. Mohr, and Joseph Jorgensen.
WILLIAM G. CLARK,
J. K. STRAUS,
As to C. B. Wright and C. B. Wright, Jr.
EDWARD WHEELER,
As to W. C. Squire.
E. L. STEVENSON,
FRANCIS T. WEST,
As to T. F. Oakes and Nelson Bennett.
H. E. HOUGHTON,
F. H. GRAVES,
As to E. J. Brickell and A. A. Newbery.

I, Arthur A. Newbery, do hereby certify that I am the secretary of the Spokane and Palouse Railway Company, first incorporated under the name of Eastern Washington Railway Company, and that I have compared the annexed and foregoing copy with the original supplemental articles of incorporation on file in my office, and that the same is a true copy thereof, and of the whole thereof.

In witness whereof: I have hereunto set my hand, and affixed the corporate seal of the said company, this twenty-third day of April, 1886.

[SEAL.] ARTHUR A. NEWBERY,
Secretary of Spokane and Palouse Railway Co.

253 3456. Department of the Interior L. & R. R. Div. Received May 3, 1886.

UNITED STATES OF AMERICA, *Territory of Washington*:

Office of the Territorial Secretary.

OLYMPIA, *April* 3, 1886.

I, N. H. Owings, Secretary of Washington Territory, do hereby certify that "Supplemental Articles of Incorporation of the Eastern Washington Railway Company, were on the 1st day of March, 1886, filed for record, and on the 11 day of March, 1886, were recorded in book "G" pages 379-383.

Witness my hand and the Great Seal of The Territory, at Olympia, this the 3rd day of April, A. D. 1886.

[SEAL.]

N. H. OWINGS,
Secretary of Washington Territory.

OFFICE OF COUNTY AUDITOR OF SPOKANE COUNTY,
WASHINGTON TERRITORY.

I, B. C. Van Houten, Auditor of Spokane County, Washington Territory do hereby certify that the supplemental articles of incorporation of the Eastern Washington Railway Company (now called the Spokane and Palouse Railway Company) were filed in my office, on the third day of March, 1886, and were duly recorded, in the records of my office, in book B, of Miscellaneous Records, on pages 188-191 on the 27th day of March, 1886; and that said supplemental articles of incorporation now remain on file in my office as required by law, and that the copy attached hereto is a correct copy of the said articles of incorporation, and of the whole thereof.

Witness my hand and the seal of my office at Cheney, Washington Territory, this twenty-third of April, 1886.

[SEAL.]

B. C. VAN HOUTEN,
Auditor Spokane Co., W. T.

254 I, Arthur A. Newbery, Secretary of the Spokane and Palouse Railway Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing laws of the territory of Washington, and that the copy of the supplemental articles of incorporation of the company filed in the department of the interior is a true and correct copy of the same.

In witness whereof I have hereunto set my hand and the corporate seal of the company this 26th day of April, 1886.

[SEAL.]

ARTHUR A. NEWBERY,
Secretary of the Spokane and Palouse Railway Company.

TERRITORY OF WASHINGTON, *County of Spokane, ss*:

Anthony M. Cannon, being duly sworn, says that he is the president of the Spokane and Palouse Railway Company, and that the following is a true list of the officers of said company, with the full name and official designation of each, to-wit:

Anthony M. Cannon, President, Spokane Falls, Wash. Ter.

Charles B. Wright, Jr., Vice-President, Philadelphia.
Arthur A. Newbery, Secretary, Spokane Falls, Wash. Ter.
Paul F. Mohr, Engineer in Chief, Spokane Falls, W. T.
[SEAL.] ANTHONY M. CANNON,
President of the Company.

Subscribed and sworn to before me this twenty sixth day of April, 1886.

FRANK H. GRAVES,
Notary Public, Wash. Ter.

255 *Supplemental Articles of Incorporation of the Eastern Washington Railway Company.*

Know all men by these presents: That we, the undersigned, Thomas F. Oakes, Charles B. Wright, E. J. Brickell and Watson C. Squire, the corporators of the Eastern Washington Railway Company, a corporation duly organized and existing under the laws of the territory of Washington, namely chapter 185 of the Code of Washington, entitled "Formation of Corporations" and we the undersigned the said Thomas F. Oakes, Nelson Bennett, Charles B. Wright, Jr., Anthony M. Cannon, Paul F. Mohr, A. A. Newbery, and Joseph Jorgensen, the trustees of said corporation, do by these supplemental articles, and in accordance with the provisions of Section 2422 of said Code, amend the articles of incorporation of the said Eastern Washington Railway Company, in the manner following, that is to say:

Article first is hereby amended so as to read as follows:

First.

That the name of said corporation is the "Spokane and Palouse Railway Company."

Article second is hereby amended so as to read as follows:

Second.

The object and purposes for which the said corporation is formed are:

1. To build, equip, run, and operate a railroad to be operated by steam, from a point of connection with the main line of the Northern Pacific Railroad Company, at or near the town of Marshall in the county of Spokane, to some eligible point on or near the Snake river, all in said Territory of Washington.

2. To build, equip, run, and operate branch railroads from such points on said railroad to such other points or places in the said territory of Washington, as shall be determined from time to time by the trustees of said corporation.

256 3. To construct and to maintain and operate upon the line of the said railroad and branches, telegraph lines, or to contract with telegraph companies for the construction, maintenance, and operation of such telegraph lines.

4. To borrow money for the purposes of the said corporation on bonds, notes, bills, acceptances, or otherwise, at such rates of interest and upon such terms as the trustees of the said corporation shall determine, and to secure the payment of the same by mortgage or mortgages upon its property, rights, privileges, exemptions, immunities, and franchises, or, upon any part thereof, or by such other security or securities as the trustees may determine.

In witness whereof, We have hereunto subscribed our names, this sixth day of February, in the year eighteen hundred and eighty-six—in triplicate.

T. F. OAKES,
C. B. WRIGHT,
E. J. BRICKELL,
WATSON C. SQUIRE,
Corporators.

T. F. OAKES,
NELSON BENNETT,
C. B. WRIGHT, JR.,
ANTHONY M. CANNON,
PAUL F. MOHR,
A. A. NEWBERY,
JOSEPH JORGENSEN,
Trustees.

In presence of:

L. R. KIDDER,
J. W. SINCLAIR,
(As to Anthony M. Cannon, Paul F. Mohr, and Joseph Jorgensen.)
WILLIAM G. CLARK,
J. K. STRAUS,
(As to C. B. Wright and C. B. Wright, Jr.)
EDWARD WHEELER,
As to W. C. Squire.
E. T. STEVENSON,
FRANCIS T. WEST,
As to T. F. Oakes and Nelson Bennett.
H. E. HOUGHTON,
F. H. GRAVES,
As to E. J. Brickell and A. A. Newbery.

257 STATE OF NEW YORK, *City and County of New York, ss:*

It is hereby certified that on this sixth day of February, in the year eighteen hundred and eighty-six, at my office in the said city of New York, before me, a commissioner duly appointed by the governor of the territory of Washington, to take in the state of New York, the proof of acknowledgment of deeds and other instruments to be used or recorded in said territory, personally came Anthony M. Cannon, Paul F. Mohr, and Joseph Jorgensen, to me personally known, and known to me to be three of the identical persons described in, and who executed the foregoing instrument, and they

severally acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein expressed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, the day and year in this certificate above written.

[SEAL.] L. R. KIDDER,
Commissioner of Deeds in New York for Territory of Washington.

STATE OF MINNESOTA, *County of Ramsey, ss:*

It is hereby certified that on this 15th day of February, in the year eighteen hundred and eighty-six, before me, a notary public in and for the county and state aforesaid, at my office in the city of Saint Paul, in said county, personally came Thomas F. Oakes, to me personally known, and known to me to be the individual described in, and who executed the foregoing instrument, as a corporator, and also as a trustee, of the corporation therein mentioned, and acknowledged to me that he executed the same freely and voluntarily, for the uses and purposes therein expressed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal the day and year in this certificate above mentioned.

[NOTARIAL SEAL.] E. T. STEVENSON,
Notary Public, Ramsey County, Minn.

258 STATE OF MINNESOTA, *County of Ramsey, ss:*

It is hereby certified that on this fifteenth day of February, in the year eighteen hundred and eighty-six, before me, a notary public in and for the county and state aforesaid, at my office in the city of Saint Paul in said county, personally came Nelson Bennett, to me personally known, and known to me to be the individual described in and who executed the foregoing instrument, as a corporator and also as a trustee, of the corporation therein mentioned, and acknowledged to me, that he executed the same freely and voluntarily, for the uses and purposes therein expressed.

In witness whereof, I have hereunto subscribed my name and affixed my official seal the day and year in this certificate above writen.

[NOTARIAL SEAL.] E. T. STEVENSON,
Notary Public, Ramsey County, Minnesota.

STATE OF PENNSYLVANIA, *City and County of Philadelphia, ss:*

It is hereby certified that on this ninth day of February, in the year eighteen hundred and eighty-six, at my office in the said city of Philadelphia, before me, a commissioner duly appointed by the governor of the territory of Washington to take, in the state of Pennsylvania, the proof or acknowledgment of deeds and other instruments to be used or recorded in said territory, personally came Charles B. Wright and Charles B. Wright, Jr., to me per-

sonally known, and known to me to be two of the individuals described in, and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein expressed.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal the day and year in this certificate above written.

[SEAL.] WILLIAM G. CLARK,
Commissioner of Deeds for the Territory of Washington, in Philadelphia, Penn.

259 TERRITORY OF WASHINGTON, *County of Spokane, ss:*

It is hereby certified that on this twenty-third day of February, A. D. 1886, at my office, before me, a notary public in and for the territory of Washington, duly appointed by the governor thereof personally came E. J. Brickell, and A. A. Newbery to me personally known, and known by me to be two of the persons described in and who executed the foregoing instrument—the said E. J. Brickell, as corporator, and the said A. A. Newbery, as trustee—and they severally acknowledged that they executed the same freely and voluntarily as aforesaid, for the uses and purposes therein set forth.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal the day and year in this certificate above written.

[NOTARIAL SEAL.] FRANK H. GRAVES,
Notary Public, Washington Territory.

2888 Department of the Interior L. & R. R. Div. Received Apr. 14, 1886.

3456 Department of the Interior L. & R. R. Div. Received May 3 1886.

UNITED STATES OF AMERICA, *Territory of Washington:*

Office of the Territorial Secretary.

OLYMPIA, *April* 3, 1886.

I, N. H. Owings, Secretary of Washington Territory, do hereby certify that the articles of incorporation of "The Eastern Washington Railway Company" were on the 3rd day of December, 1885, filed for record, and on the 21st day of December, 1885, were recorded in book "G" pages 334-336.

Witness my hand and the Great Seal of the Territory at Olympia, this the 3 day of April, A. D. 1886.

[SEAL.] N. H. OWINGS,
Secretary of Washington Territory.

260 OFFICE OF COUNTY AUDITOR OF SPOKANE COUNTY, WASHINGTON TER.

I, B. C. Van Houten, Auditor of Spokane County, Washington Territory, do hereby certify that the articles of incorporation

of the Eastern Washington Railway Company were filed in my office on the seventh day of December, 1885, and were duly recorded in the records of my office, in Book B, of Miscellaneous Records, on page- 168-9 on the twenty-fourth day of December, 1885, and that said articles of incorporation now remain on file in my office as required by law, and that the copy attached hereto is a correct copy of the said articles of incorporation, and of the whole thereof.

Witness my hand and the seal of my office at Cheney, Washington Territory, this twenty-third day of April, 1886.

[SEAL.] B. C. VAN HOUTEN,
Auditor, Spokane Co., W. T.

I, Arthur A. Newbery, Secretary of the Spokane and Palouse Railway Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing laws of the territory of Washington, and that the copy of the articles of incorporation of the company filed in the department of the interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company. This 26th day of April 1886.

[SEAL.] ARTHUR A. NEWBERY,
Secretary of the Spokane and Palouse Railway Company.

TERRITORY OF WASHINGTON, *County of Spokane, ss:*

Anthony M. Cannon, being duly sworn, says that he is the president of the Spokane and Palouse Railway Company and that
261 the following is a true list of the officers of said Company, with the full name and official designation of each, to-wit:

Anthony M. Cannon, President, Spokane Falls, Wash. Ter.
Charles B. Wright, Jr., Vice-President, Philadelphia.
Arthur A. Newbery, Secretary, Spokane Falls, Wash. Ter.
Paul F. Mohr, Engineer in chief, Spokane Falls, W. T.

[SEAL.] ANTHONY M. CANNON,
President of the Company.

Subscribed and sworn to before me this twenty sixth day of April, 1886.

FRANK H. GRAVES,
Notary Public, Wash. Ter.

Articles of Incorporation.

Know all Men by these Presents That we the undersigned have this day voluntarily associated ourselves together for the purpose of forming and we do hereby agree to form and become a corporation, under and by virtue of the laws of the territory of Washington; and we do hereby certify:—

First.

That the name of the said corporation is "The Eastern Washington Railway Company.

Second.

That the objects and purposes for which it is formed are, to build, construct, equip, operate, run, lease, sell, and mortgage a railroad, to be operated by steam, from and between some eligible and practicable point on the Northern Pacific Railroad, and to connect therewith, between mile post number 145, and the Idaho Line in Washington Territory, and some eligible and practical point in the Territory of Washington, on or near the Snake river; and to purchase, sell, lease, mortgage, and deal in real estate, in the territory of Washington.

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Third.

That the amount of the capital stock of this corporation shall be one million dollars, divided into ten thousand shares of the par value of one hundred dollars, each.

Fourth.

That the term for which said corporation is to exist is fifty years from and after the date of its incorporation.

Fifth.

That the number of its trustees shall be seven, and that the names and residences of those trustees, who are hereby appointed and who shall manage the concerns of the company from the date of its incorporation until the first day of April, 1886, are—whose residence is

Foreign Directors:

T. F. Oakes, of St. Paul, Minn.
Nelson Bennett, of Deer Lodge, Montana.
Charles B. Wright, Jr., of Philadelphia, Pa.

Domestic Directors:

Residence.

Anthony M. Cannon, of Spokane Falls.
Paul F. Mohr, of Spokane Falls.
A. A. Newbery, of Spokane Falls.
Joseph Jorgenson, of Walla Walla.

Sixth.

That the principal place of business of the company is to be in the city of Spokane Falls, in the county of Spokane, in the territory of Washington.

In witness whereof we have hereunto set our hands and our seals this fifteenth day of November, in the year one thousand eight hundred and eighty-five.

T. F. OAKES, [SEAL.]
St. Paul, Minn.
E. J. BRICKELL, [SEAL.]
Spokane Falls, Washington Territory.
C. B. WRIGHT, [SEAL.]
Philadelphia.
WATSON C. SQUIRE, [SEAL.]
Olympia, W. T.

263 STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

On this twentieth day of November, A. D. 1885, before me a commissioner of deeds for Washington Territory, personally, came Charles B. Wright, personally known to me to be one of the persons whose names are subscribed to the within instrument as parties thereto, and acknowledged the execution of the same for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year above written.

[COMMISSIONER'S SEAL.] WILLIAM G. CLARK,
Commissioner of Deeds, etc., for the Territory of Washington in Philadelphia, Pa.

STATE OF MINNESOTA, *County of Ramsey, ss:*

Be it known, that on this sixteenth day of November, A. D. 1885, personally came before me, a notary public, Thomas F. Oakes, to me personally known to be one of the persons described in, and who executed the foregoing instrument, and acknowledged that he executed the same freely and voluntarily, for the uses and purposes therein expressed.

[NOTARIAL SEAL.] E. T. STEVENSON,
Notary Public, Ramsey County, Minn.

TERRITORY OF WASHINGTON, *County of Spokane, ss:*

Be it known that on this twenty-seventh day of November, A. D. 1885, personally came before me, a notary public, in and for the county and territory above named, E. J. Brickell, to me personally known to be the person who executed the foregoing instrument and acknowledged to me that he executed the same freely and voluntarily for the purposes and uses therein expressed.

[NOTARIAL SEAL.] A. A. NEWBERY,
Notary Public.

264 TERRITORY OF WASHINGTON, *County of Thurston, ss:*

Be it known, that on this third day of December, A. D. 1885, personally came before me, a notary public, Watson C. Squire to me personally known to be one of the persons described in and who executed the foregoing instrument, and acknowledged that he executed the same freely and voluntarily, for the uses and purposes therein named.

[NOTARIAL SEAL.] CHARLES H. AYER,
Notary Public for Washington Territory.

2888. Department of the Interior, L. & R. Div. Received Apr. 14 1886.

3456. Department of the Interior. Received May 3 1886.

Articles of Incorporation.

Know all Men by these Presents: That we the undersigned have this day voluntarily associated ourselves together for the purpose of forming, and we do hereby agree to form and become a corporation, under and by virtue of the laws of the Territory of Washington; and we do hereby certify:

First.

That the name of the said corporation is the "Eastern Washington Railway Company."

Second.

That the objects and purposes for which it is formed are, to build, construct, equip, operate, run, lease, sell and mortgage a rail-
265 road, to be operated by steam, from and between some eligible and practicable point on the Northern Pacific Railroad, and to connect therewith, between mile post number 145, and the Idaho line in Washington Territory, and some eligible and practical point in the Territory of Washington, on or near the Snake river; and to purchase, sell, lease, mortgage, and deal in real estate, in the territory of Washington.

Third.

That the amount of the capital stock of this corporation shall be one million dollars, divided into ten thousand shares of the par value of one hundred dollars each.

Fourth.

That the term for which said corporation is to exist is fifty years from and after the date of its incorporation.

Fifth.

That the number of its trustees shall be seven, and that the names and residences of those trustees, who are hereby appointed and who shall manage the concerns of the company from the date of its incorporation until the first day of April, 1886, are: whose residence is

Foreign Directors:

T. F. Oakes, of St. Paul, Minn.
Nelson Bennett, of Deer Lodge, Montana.
Charles B. Wright, Jr., of Philadelphia, Pa.

Domestic Directors:

Residence.

Anthony M. Cannon, of Spokane Falls.
Paul F. Mohr, of Spokane Falls.
A. A. Newbery, of Spokane Falls.
Joseph Jorgensen, of Walla Walla.

Sixth.

That the principal place of business of the company is to be in the city of Spokane Falls, in the county of Spokane, in the territory of Washington.

In witness whereof, We have hereunto set our hands and our seals this fifteenth day of November, in the year one thousand eight hundred and eighty-five.

T. F. OAKES, [SEAL.]
St. Paul, Minn.
E. J. BRICKELL, [SEAL.]
Spokane Falls, Washington Ter.
C. B. WRIGHT, [SEAL.]
Philadelphia.
WATSON C. SQUIRE, [SEAL.]
Olympia, W. T.

266 I, Arthur A. Newbery, do hereby certify that I am the secretary of the Spokane and Palouse Railway Company, first incorporated under the name of Eastern Washington Railway Company, and that I have compared the annexed and foregoing copy with the original Articles of Incorporation on file in my office, and that the same is a true copy thereof, and of the whole thereof.

In witness whereof: I have hereunto set my hand, and affixed the corporate seal of the said company, this twenty-third day of April, 1886.

[SEAL.] ARTHUR A. NEWBERY,
Secretary of Spokane and Palouse Railway Co.

3456. Department of the Interior, L. & R. R. Div. Received May 3, 1886.

TERRITORY OF WASHINGTON, *County of Spokane, ss:*

Paul F. Mohr, being duly sworn, says he is the engineer in charge of the Spokane and Palouse Railway Company; that the survey of the route showing the extension of said road from Belmont, Whitman county, Washington Territory, to a point ten miles beyond Genesee, Nez Perces County, Idaho Territory, a distance of 72 37/100 miles was made by him, as engineer in charge of the company and under its authority commencing on the 25th day of November, 1886, and ending on the 15th day of April 1887, and that such survey is accurately represented on the accompanying map.

PAUL F. MOHR.

Sworn and subscribed before me this 30th day of May, 1887.

[SEAL.] HORACE E. HOUGHTON,
Notary Public, Wash. Ter.

267 I, A. M. Cannon, do hereby certify that I am president of the Spokane and Palouse Railway Company, that Paul F. Mohr, who subscribed the foregoing affidavit, is engineer in charge

of said company, that the survey of the line of route of the company's road as accurately represented on the accompanying map, was made under the authority of the company, that the said line of route so surveyed, and as represented on the said map, was adopted by the company by resolution of its board of directors on the 28th day of May, 1887, as the definite location of the extension of said road from Belmont Whitman county, Washington Territory, to a point ten miles beyond Genesee Nez Perces county, Idaho Territory, a distance of 72 37/100 miles, and that the map has been prepared to be filed, for the approval of the secretary of the interior, in order that the company may obtain the benefits of the act of congress approved March 3rd, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States."

A. M. CANNON,
President of the Spokane and Palouse Railway Co.

A. A. NEWBERY, *Secretary.*
[SEAL.]

J. M. M.
A. M.

Dept. of the Interior, June 27, 1888.

Approved.
D. L. HAWKINS,
Acting Secretary.
D. L. H.

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Map

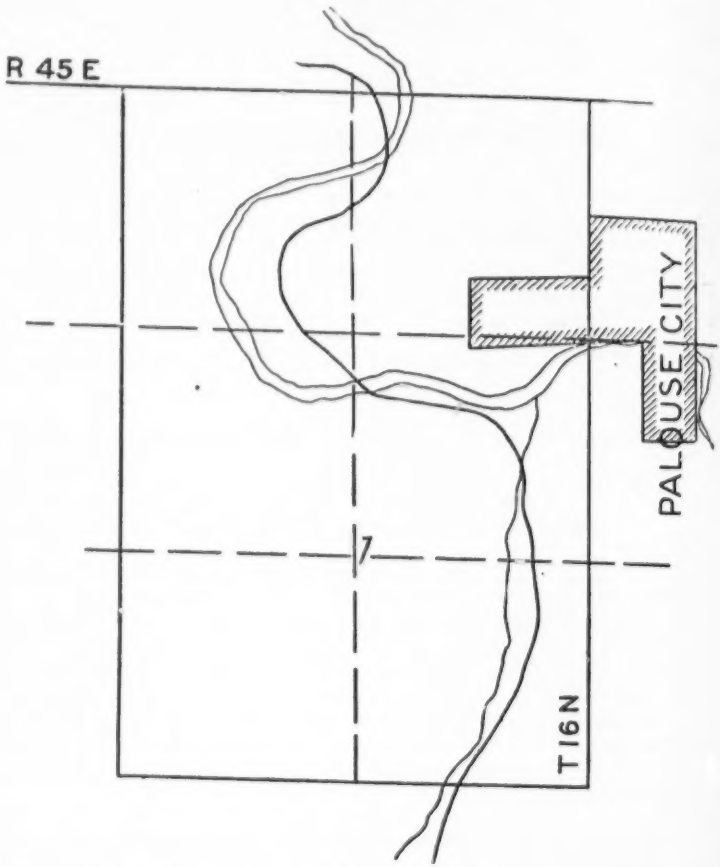
Showing Definite Location of the Spokane & Palouse Railway

From

Belmont, W. T., to Genesee, I. T.

Scale 2000'=1 inch.

(1st Section)



TERRITORY OF WASHINGTON, *County of Spokane, ss:*

Paul F. Mohr, being duly sworn, says he is the engineer in charge of the Spokane and Palouse Railway Company; that the survey of the route showing the extension of said road from Belmont, Whit-

man County, Washington Territory, to a point ten miles beyond Genesee, Nez Perces County, Idaho Territory, a distance of 72 37/100 miles, was made by him as engineer in charge of the company and under its authority, commencing on the 25th day of November, 1886, and ending on the 15th day of April, 1887, and that such survey is accurately represented on the accompanying map.

PAUL F. MOHR.

Sworn and subscribed before me this 30th day of May, 1887.

HORACE E. HOUGHTON,

[SEAL.] *Notary Public, Wash. Ter.*

I, A. M. Cannon, do hereby certify that I am president of the Spokane and Palouse Railway Company, that Paul F. Mohr, who subscribed the foregoing affidavit, is engineer in charge of said company, that the survey of the line of rout- of the company's road as accurately represented on the accompanying map, was made under the authority of the company, that the said line of route so surveyed, and as represented on the said map, was adopted by the company by resolution of its board of directors on the 28th day of May, 1887, as the definite location of the extension of said road from Belmont, Whitman county, Washington Territory, to a point ten miles beyond Genesee Nez Perces County, Idaho Territory, a distance of 72-37/100 miles, and that the map has been prepared to be filed for the approval of the secretary of the interior, in order that the company may obtain the benefit of the Act of Congress approved March 3rd, 1875, entitled "An act granting to Railroads the Right of Way through the Public Lands of the United States."

A. M. CANNON,

President of the Spokane and Palouse Railway Co.

A. A. NEWBERY,

Secretary.

J. M. M.
A. M.

Dept. of the Interior, June 27, 1888.

Approved.

D. L. HAWKINS,

[SEAL.] *Acting Secretary, D. D. H.*

269 Thereupon the defendants and each of them offered and the court admitted in evidence a copy of that portion of a certain map filed by the Spokane and Palouse Railway Company, showing the line of its road extending from Belmont, Washington Territory, to Genesee, Idaho Territory, approved by the secretary of the interior June 27, 1886, so far as the same relates to the premises in controversy, with the endorsements, thereon, duly certified by the commissioner of the general land office, and a copy of said map with the endorsements thereon is hereunto attached and made a part hereof, and the certificate of the commissioner of the general land office thereto is contained in the certificate hereinbefore set forth and attached to the copy of the articles of incorporation and proof of organization thereunder of said Spokane and Palouse Railway Company.

270 Map

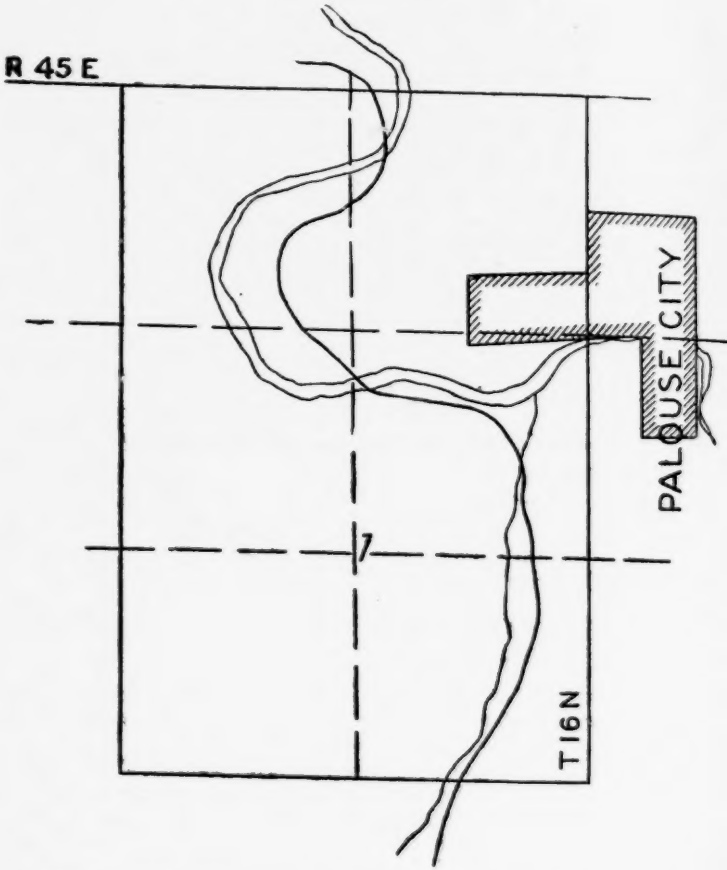
Showing Definite Location of the Spokane & Palouse Railway

From

Belmont, W. T., to Genesee, I. T.

Scale 2000′=1 inch.

(1st Section)



TERRITORY OF WASHINGTON, *County of Spokane*, ss:

Paul F. Mohr, being duly sworn, says he is the engineer in charge of the Spokane and Palouse Railway Company; that the survey of the route showing the extension of said road from Belmont, Whit

man County, Washington Territory, to a point ten miles beyond Genesee, Nez Perces County, Idaho Territory, a distance of 72 37/100 miles, was made by him as engineer in charge of the company and under its authority, commencing on the 25th day of November, 1886, and ending on the 15th day of April, 1887, and that such survey is accurately represented on the accompanying map.

PAUL F. MOHR.

Sworn and subscribed before me this 30th day of May, 1887.

HORACE E. HOUGHTON,
Notary Public, Wash. Ter.

[SEAL.]

I, A. M. Cannon, do hereby certify that I am president of the Spokane and Palouse Railway Company, that Paul F. Mohr, who subscribed the foregoing affidavit, is engineer in charge of said company, that the survey of the line of rout- of the company's road as accurately represented on the accompanying map, was made under the authority of the company, that the said line of route so surveyed, and as represented on the said map, was adopted by the company by resolution of its board of directors on the 28th day of May, 1887, as the definite location of the extension of said road from Belmont, Whitman county, Washington Territory, to a point ten miles beyond Genesee Nez Perces County, Idaho Territory, a distance of 72-37/100 miles, and that the map has been prepared to be filed for the approval of the secretary of the interior, in order that the company may obtain the benefit of the Act of Congress approved March 3rd, 1875, entitled "An act granting to Railroads the Right of Way through the Public Lands of the United States."

A. M. CANNON,
President of the Spokane and Palouse Railway Co.

A. A. NEWBERY,
Secretary.

J. M. M.
A. M.

Dept. of the Interior, June 27, 1888.
Approved.
D. L. HAWKINS,
[SEAL.] *Acting Secretary, D. D. H.*

271 Thereupon the defendants and each of them offered in evidence a copy, duly certified by the commissioner of the general land office, of so much of the tract book in the office of said commissioner of the general land office as relates to government lots ten (10), eleven (11), fourteen (14) and fifteen (15) section one (1), township sixteen (16) north, of range forty-five (45) east of the Willamette Meridian, in Whitman county, Washington, which said copy and the certificate thereto is in words and figures following, to-wit:

4–600. *Township No. 16 N., Range No. 45 E., District of* ——.

Description of tract.				Contents.		Rate per acre.	Purchase money.	Name of purchaser.	Date of sale.	Number of receipt and certificate of purchase.	To whom patented.	Date of patent.	Where recorded. Vol. Page.
Part of section.	Section.	Town.	Range.	Acres.	100ths.	Dollars.	Dollars.						
Lots 10, 11, 14 & 15	1	16	45	Contest in "F" 8–7088.									
Hd. lots 10, 11, 14, & 15	"	"	"	Closed in favor of Slaght July 18, 1896.									
				160			10.	Jacob Slaght.	July 29 1896	5767	F. C.	No. 2679	Sept. 10, 1896.
Lots 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, and S. W. 4.	"	"	"	653.23		Selected Dec. 17 1883 by N. P. Railroad Co.	Act July 2 1864 List No. 1.				Canc'd as to lots 10, 11, 14, & 15 by F. July 18 1896 See rearranged list No. 2 of May 12 1899 58913.		
Lots 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, and S. W. 4.	"	"	"	653.23		Selected Dec. 17, 1883 by. N. P. R.R. Co.	See sec-. 31–46a 3rd Cœur d'Alene res. Idaho Acts July 2 1864 & May 31 1870 in lieu of sec-. 7–9 N. 15 E. Approved as to S. W. 4, Nov. 15 and pat'd Nov. 21 1898 List No. 78. Amended list No. 2 Canc'd as to lots 10, 11, 14 & 15 by F. July 13 1896. Canc'd as to lots 4, 5, 12 and 13 by F. Oct. 1 1898 Canc'd as to 2, 3, 6 and 7 by F. March 1, 1900.					

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4–207.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Jan.* 4, 1902.

I, Binger Hermann, Commissioner of the General Land Office, do hereby certify that the annexed copy of so much of the tract book of this office as relates to Lots 10, 11, 13 and 14 Sec. 1, T. 16 N. R. 45 E. Walla Walla Washington land district is a true and literal exemplification thereof from said tract book in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

BINGER HERMANN,
Commissioner of the General Land Office.

[SEAL.]

Thereupon the defendants and each of them offered and the court admitted in evidence a copy of the tract book of the United States district land office at Walla Walla, Washington, so far as the same relates to government lots ten (10), eleven (11), fourteen (14), and fifteen (15) section one (1), township sixteen (16) north, of range forty five (45) east of the Willamette Meridian, in Whitman county, Washington, duly certified by the register of said land office, which copy and the certificate thereto is in words and figures following, to-wit:

273 Description of tract.				Acres.	Rate per acre.	Purchase money.	Name of purchaser.	Date of sale.	Number of receipt and certificate of purchase.	Remarks.
Part of section—	Sec.	Tp.	Rg.							
Lots 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14 & 15 & S. W. ¼.....	1	16	45	653.23	.....	.....	N.P.R.R.Co.	Selected Dec. 17, 1883.	....	Company's list cancelled as to lots 10, 11, 14 & 15 by letter "F" of April 13, 1895.
Homestead Application for lots 10, 11, 14 & 15.	1	16	45	by Jac 1887,	ob Sl and re	aght, filed jected for	November 2, conflict.			
Homestead Application for lots 10, 11, 14 & 15.	1	16	45	160	$1.25	$10	Jacob Slaght.	July 29, 1896	5767	Allowed by letter "F" of July 18, 1896 Final certificate No. 2679, September 10, 1896.

WALLA WALLA, WASH., *January* 11, 1902.

I, John M. Hill, Register of the United States Land Office at Walla Walla, Washington, do hereby certify that the above and foregoing is a true and complete transcript from the tract book of this office, as it appears January 11, 1902, showing the status of the Lots 10, 11, 14 and 15, Sec. 1, Tp. 16 N., R. 45 E. W. M.

JOHN M. HILL, *Register.*

274 That thereafter and before the court made and filed its findings of fact and conclusions of law herein, said defendants and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 1.

"That the defendants are in possession of the premises described in their separate second amended answers, and shown in the respective exhibits thereto attached, and claim the same in the manner and as set forth in said answers, and have been in possession and claiming the same as stipulated in the agreed statement of facts filed herein. That the possession of the defendant Railway Company and its predecessor in interest, the Spokane & Palouse Railway Company has been continuous, open and notorious since the year 1886, and they have occupied and used the same as a right of way for a railroad continually since the year 1886."

That at the same time and before the court made its findings of fact and conclusions of law herein, said defendants and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 2.

"That at the time of the construction of the railroad across the premises involved herein, the plaintiff resided upon said land and in a house located at a point within fifteen feet of the rails of the main line and at a point about fifty feet west of government lots nine and ten in said section one and knew by observation that said road was being constructed, and that large sums of money were being expended, and paid out on account of said road, and that said railroad was being constructed for carrying freight and passengers thereon and thereover, and knew that the Spokane & Palouse Railway Company then and thereafter claimed a right of way one hundred feet wide on each side of said main line and knew of the making and marking of the survey thereof."

And at the same time and before the court made its findings of fact and conclusions of law herein, said defendants and each of them presented to said court in writing, and requested the court to find as follows:

275 Finding requested No. 3.

"That at the time when the surveyors first entered upon said land for the purpose of surveying and locating said railroad, the plaintiff published in the Palouse News, a weekly newspaper printed and published at Palouse City, Washington, a notice as follows: 'Notice is hereby given to all persons whomsoever not to trespass on my homestead claim which is: Lots 10, 11, 14 and 15, Sec. 1, Tp. 16, N. R. 45 E. W. M., Whitman county, W. T., Signed Jacob Slaght,' which was the only notice or formal objection which the plaintiff made to the construction of said railroad."

And at the same time and before the court made its findings of fact and conclusions of law herein, said defendants and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 4.

"That in August, 1887, the said Northern Pacific Railroad Company, claiming to be the owner of said lots 10 and 11, sold and conveyed the same by deed of conveyance, containing the usual covenants and warranties to William L. Powers, and that afterwards, on the 14th day of September, 1887, the said William L. Powers and wife conveyed by deed of conveyance to the Spokane and Palouse Railway Company a tract of land for a right of way 200 feet wide, being the land shown and marked in defendant's exhibit A in their answer, as the tract occupied by the defendant Northern Pacific Railway Company as its right of way."

And at the same time and before the court made its findings of fact and conclusions of law herein, said defendants and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 5.

"That without objection on the part of the plaintiff (other than the publication of a notice in a newspaper as follows: 'Notice is hereby given to all persons whomsoever not to trespass on my homestead claim which is: Lots 10, 11, 14 and 15, Sec. 1, Tp. 16, N. R. 45 E. W. M., Whitman County, Washington. Signed Jacob Slaght,' and published when the surveyors first entered upon said land for the purpose of surveying and locating the railroad) there has been constructed upon
276 said right of way on the premises in controversy, valuable and lasting improvements in the shape of railroad bridges, water tank and warehouses, which would be practically of no value should the road and right of way of defendant Northern Pacific Railway Company be changed from the premises in controversy.

That it would be a great expense to defendant, the Northern Pacific Railway Company, to change its line of road and right of way over the premises in controversy, and that some of the improvements of said road consisting of bridges and water tank and embankments would be of no particular value, should the road or right of way be changed from the premises in controversy."

And at the same time and before the court made its findings of fact and conclusions of law herein, said defendants and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 6.

"That the defendants John Miller and Anna Miller, his wife, and the Washington Grain & Milling Company, a corporation, are the owners of and operating warehouses situated, designated and located on said plat marked "Exhibit A" of defendants' answer, said warehouses having been constructed and erected on said land under a grant or lease of premises from the said Northern Pacific Railway Company, or its grantor the Spokane and Palouse Railway Company, but without permission of the plaintiff herein (unless the facts stated in the stipulation of facts filed herein show such consent)."

And at the same time and before the court made its findings of fact and conclusions of law herein, said defendants and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 7.

"That during the time that all of said warehouses were being constructed the plaintiff was residing upon said government lots ten and eleven of section one, township sixteen north range forty five east of the Willamette Meridian, Whitman County, Washington."

And at the same time and before the court made its findings of fact and conclusions of law herein, said defendants and each of them presented to said court in writing, and requested the court to find as follows:

277

Finding requested No. 8.

"That no suit or action was brought by plaintiff to prevent or restrain the erection, construction or maintenance on the premises in controversy of the said railroad or any of said warehouses, nor to procure the possession thereof, or damages for the retention of the same prior to the commencement of this action, and that this action was commenced within a few months and as soon as practicable after the decision of the supreme court of the United States, affirming the decision of the supreme court of the state of Washington."

And at the same time and before the court made its findings of fact and conclusions of law herein, said defendants and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 9.

"That said township sixteen north, of range forty five east was surveyed by the United States in the year 1874 and a plat thereof duly approved was filed in the district land office at Walla Walla, Washington Territory, on the 2nd day of April, in the year 1875, and said government lots 10, 11, 14 and 15 were at the date of filing said plat and survey, and thereafter remained, except for the claims of said Jacob Slaght and the Spokane & Palouse Railway Company, public lands of the United States not reserved."

And at the same time and before the court made its findings of fact and conclusions of law herein, said defendants and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 10.

"That the defendants herein other than the Northern Pacific Railway Company are tenants of said Railway Company, and have and hold possession of portions of the premises described in the complaint only as such lessees for a short period of time, and as warehousemen and have warehouses erected on the parts thereof leased to them, and they receive and accept as warehousemen all grain tendered to them to the extent of their capacity for shipment over the line of the Northern Pacific Railway Company."

278 And at the same time and before the court made its findings of fact and conclusions of law herein said defendants

and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 11.

"That it would be possible for the defendant Northern Pacific Railway Company to carry freight, passengers and U. S. mail, from Spokane, to and from Lewiston, Idaho, through Palouse, Washington, on or over a right of way across plaintiff's land, not exceeding 25 feet wide and a space 100 feet square would permit the erection of a depot at Palouse, but great inconvenience would result to the citizens of Palouse and vicinity and to the said railway company if this were all the facilities had by said railway company for receiving and delivering freight and passengers and U. S. mail; that for the convenience, prompt and expeditious receipt and delivery and shipment and handling of freight and for the erection of warehouses and elevators for the storing of freight and wheat at Palouse, Washington, it is necessary to have in addition to the main track, depot, switches, turnouts, warehouses, water tanks, elevators and other structures which require as right of way a space as large as that claimed by the defendant railway company as shown by the Exhibit attached to its answer, that is, the whole of the premises in controversy in this action."

And at the same time and before the court made its findings of fact and conclusions of law herein said defendants and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 17.

"That said town of Palouse is a thriving municipal corporation of the third class, and was organized and incorporated under the laws of the state of Washington, on the 17th day of June, 1889, and the territory included in the limits thereof, at the date of its organization was the following, to-wit:

Commencing at the northeast corner of lots three (3) in section six (6) in township sixteen (16) north of range forty six (46) east of the Willamette Meridian, in Whitman
279 county, State of Washington, running thence west along the township line one (1) mile to the center line of section one (1) in said township sixteen (16), north of range forty-five (45) east, of the Willamette Meridian, running thence south along the center line of section one (1) aforesaid 285 rods, thence running due east parallel with the north boundary line thereof one (1) mile to a point on the east line of southeast quarter (SE-1/4) of northwest quarter (NW-1/4) of the said section six (6) aforesaid, running thence north parallel with the west boundary line thereof to the North Palouse river, thence easterly up said river to a point in said river where the east line of Winfield street in Fisher's Addition to Palouse City, Washington, as shown upon the recorded plat thereof now of record in the auditor's office of Whitman county, Washington, *produced* south, will cross said river being about 690 feet east of the east line of said lot three (3) in section six (6) aforesaid, running thence north to the center line of Idaho avenue in said Fisher's addition aforesaid, running thence west along the center line of Idaho avenue to the east line of lot

three (3) in section six (6) in said township sixteen (16) aforesaid, and thence running north to the township line the place of beginning, lying, situate and being in section one (1) in township sixteen (16) and range forty-five (45) E. W. M. aforesaid, and in section six (6) township sixteen (16) range forty-six (46) E. W. M. aforesaid."

And at the same time and before the court made its findings of fact and conclusions of law herein said defendants and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 13.

"That the land involved in this action is much greater in value now than it was in 1886 or 1887. That said railway company increased the value thereof to some extent, and there has been a general rise in values of all lands in the vicinity of the land involved in this action."

And at the same time and before the court made its findings of fact and conclusions of law herein said defendants and each of them presented to said court in writing, and requested the court to find as follows:

Finding requested No. 14.

"That the defendant Northern Pacific Railway Company and its grantor Spokane and Palouse Railway Company during all of the years since the year 1886, were and have
280 been assessed for state and county taxes on its railroad in Whitman county, at the uniform rate of a certain sum per mile for main tracks, and a certain sum per mile for side tracks which include the right of way owned or claimed by said company in said county."

And when the said findings of fact so proposed by said defendants and each of them were so presented and requested, the court refused the same and each and all thereof, and the defendants and each of them duly excepted to such refusals and to each and all thereof, and such exceptions were and hereby are allowed.

And thereupon and before the court made and filed its findings of facts and conclusions of law herein said defendants and each of them presented to said court in writing, a conclusion of law upon the facts appearing herein, as follows:

Conclusion of law requested No. 1.

"That the defendant the Northern Pacific Railway Company is the owner of a right of way two hundred feet in width over and across said lots ten, eleven, fourteen and fifteen, of section one, township sixteen, north of range forty-five east, Willamette Meridian, Whitman county, Washington, which said right of way is bounded by two lines each parallel with and distant one hundred feet from the center line of the main track of the railway of said Northern Pacific Railway Company now located and operated over and across said lots ten, eleven, fourteen and fifteen, and said defendant Northern Pacific Railway Company is entitled to the exclusive possession of said strip of land last above described and that the defendants John A. Miller and Anna Miller, his wife, and the Washington Grain and Milling Company are rightfully in possession of those respective portions of said strip of land now occupied by them as tenants of said defendant Northern Pacific Railway Company."

And thereupon and before the court made and filed its findings of fact and conclusions of law herein said defendants and each of them presented to said court in writing, a conclusion of law upon the facts appearing herein, as follows:

Conclusion of law requested No. 2.

"That the Spokane and Palouse Railway Company the predecessor in interest of the defendant Northern Pacific Railway Company acquired a right of way two hun-
281 dred (200) feet in width viz: one hundred feet on each side of the center of the defendant railway company's railroad, under and by virtue of that certain act of Congress entitled "An act granting to railroads the right of way through the public lands of the United States,' approved March 3rd, 1875; and that by virtue thereof the defendant the Northern Pacific Railway Company, and the other defendants as its lessees are rightfully in possession under said act of congress of the premises described in the several answers of the several defendants."

And when the said conclusions of law so proposed by said defendants and each of them were so presented and requested, the court refused the same and each thereof, and the defendants and each of them duly excepted to such refusals and each thereof, and such exceptions were and hereby are allowed.

That before the court made and filed its findings of facts and conclusions of law herein, said defendants and each of them requested the said court to find as facts the matters and things contained in the agreed statement of facts duly filed herein, upon which the hearing in this cause was had, and the said defendants and each of them requested said court to find said facts in the words and figures in said agreed statement of facts contained. But the said court refused to find the matters and things in said statement of facts contained, except in so far as the same are included in the findings of fact made by the court and filed herein. And the defendants and each of them duly excepted to such refusal and such exception was and hereby is allowed.

That the findings of fact and conclusions of law so made and presented to the court before the court made, signed or filed findings of fact and conclusions of law herein, were thereafter filed with the clerk of the court on the 13th day of July, 1904, and are in words and figures as follows, to-wit:

"In the Superior Court of the State of Washington, in and for the County of Whitman.

282 No. —.

JACOB A. SLAGHT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING COMPANY, a Corporation, Defendants.

Findings of Fact and Conclusions of Law Proposed by Defendants.

Come now the defendants above named and each of them, and (before the court has made or filed findings of fact or conclusions of law herein) present, propose and request the court to make findings of fact and conclusions of law as follows, to-wit:

Findings of Fact.

I.

The Spokane and Palouse Railway Company was at all times mentioned in the pleadings, and at all times herein mentioned, and still is, a corporation organized under the laws of the Territory of Washington and thereafter existing under the laws of that territory, and of the state of Washington, and authorized to construct, maintain, and operate a line of railway from Spokane, Washington, to Lewiston, Idaho, and over and across the premises described in the pleadings herein.

II.

That at all the times and dates mentioned in the pleadings and at all times herein mentioned, defendant Northern Pacific Railway Company was, and still is, a corporation duly organized and incorporated under the laws of the state of Wisconsin.

III.

That at all the times and dates mentioned in the pleadings and at all times herein mentioned, defendant the Washington Grain & Milling Company, was and still is, a corporation organized and incorporated under the laws of the state of Washington.

IV.

That at all the times and dates mentioned in the pleadings and at all times mentioned herein, defendants John A. Miller and Anna Miller, were and still are husband and wife.

283 V.

That the defendants are in the possession of the premises described in their separate second amended answer, and shown in the exhibit thereto attached, and claim the same in the manner and as set forth in said answers, and have been in possession and claiming the same as herein stipulated. That the possession of the defendant railway company, and its predecessors in interest has been continuous, open and notorious since the year 1886, and they have occupied and used the same as a right of way for railroad continually since the year 1886.

VI.

That the plaintiff and Margaret A. Slaght were prior to the year 1883, husband and wife, and said relations continued until the first day of August, 1898, at which time by a decree of the superior court of Whitman county, state of Washington, they were divorced.

VII.

That in March 1883, the said plaintiff and the said Margaret A. Slaght as husband and wife, settled upon and established their actual residence on government lots ten (10), eleven (11), fourteen (14) and fifteen (15) section one (1), township sixteen 16 north of range forty-five 45, east of the Willamette Meridian, in Whitman county, Washington, and continued to reside thereon until after the — day of ——, 1897.

VIII.

That on the 31st day of October, 1887, the said Jacob Slaght presented, in behalf of himself and his said wife, an application to the United States district land office, for the district in which said land was situated to enter lots 10, 11, 14 and 15, section one, township 16 north of range 45, east of the Willamette Meridian, Whitman county, Washington, under act of congress, approved May 20, 1862, entitled "An Act to declare homesteads to general settlers in the public domain," and in said application alleged settlement on said land from March 4, 1883, and that the same had been continuous, and that he had built a house on said land, and had improved the same.

IX.

That upon making said application for said land the said
284 Northern Pacific Railroad Company was notified of said application and the said Northern Pacific Railroad Company thereupon filed its objections to the allowance of said application and a hearing was ordered by the United States district land office for the district in which said land was situated, for the purpose of determining the rights of the Northern Pacific Railroad Company and of the

said Jacob Slaght, in and to said described land, and after the hearing was ordered one William L. Powers intervened and a hearing was had and the local officers rendered a decision and held in words and figures as follows, to-wit:

Opinion.

THE N. P. R. R. Co.

vs.

JACOB SLAGHT, with WILLIAM L. POWERS, as Intervenor.

Involving Right to Lots 10, 11, 14, 15, Sec. 1, 16, 45.

On October 31, 1887, Jacob Slaght made homestead application for Lots 10, 11, 14, 15 Sec. 1, Tp. 16, N. R. 45 E., alleging settlement on said land March 4th, 1883.

Nov. 7, 1887 the N. P. R. R. Co. was notified of said application, they having selected said land as indemnity Dec. 17, 1883.

Dec. 6, 1887 said company filed objections to said application. Dec. 20, 1888 the register and receiver of this office issued notices in said case ordering a hearing between the parties interested for Feb. 20, 1889 before W. M. Ruley, Judge of Probate at Colfax, W. T.

On said Feb. 20, 1889 all parties interested appeared including one W. L. Powers who, by his testimony, appears to claim said lands by prior settlement and residence under act January 13, 1881 commonly called in this country the "Brents Act" if said land is declared to be government land.

From the testimony we find that in 1877 one A. M. Dufield first settled upon and claimed this land including lots 2-7-3 & 6 which together with lots 10-11-14 & 15 made 8 lots; that he shortly afterwards sold his possessory right and improvements to said land to one L. M. Rhodes on his notes for $650; that when notes became due he could not pay them, and relinquished his right to W. L.
285 Powers who took up and paid said notes in 1876, settled on the land and offered to purchase the lots 2-7-10-15 from the N. P. R. R. Company for whose benefit said land had been withdrawn from public settlement and which was being offered for sale by said company. At the same time Powers' brother John G. Powers applied to said company to buy lots 3-6-11-14; that at this time said land was recognized as railroad land; that Wm. L. Powers built a log cabin on lot 10 in winter of 1878; that in 1879 he plowed and put in grain 6 acres of said lot and continued to cultivate said land; that in 1885 he cleared lot 10 entirely and part of lot 11; that he afterwards raised two crops thereon; that in 1887 the Spokane and Palouse railroad ran through lot 11 and put a stop to the cultivation of said lot; that in spring of 1881 he built a house on lot 7 and moved into it in June of that year and has made it his home since; that he received a warrantee deed from the N. P. R. R. Company to lots 3-6-11-14 Aug. 4, 1887; that he dissolved partnership with his brother in 1885 in a general business embracing saw mill,

store, etc.; that in the settlement Wm. took a relinquishment from John of his right to lots 2-7-10-15 and received a warrantee deed from the company to said lots July 30, 1887, he having paid to said company the sum of $1249.28 for said 8 lots; that he has always been recognized as the lawful owner of said land by his neighbors, with one or two exceptions, until it was learned that the indemnity land of the N. P. R. R. Co. was in dispute; the evidence further shows that Jacob Slaght, the applicant under the homestead law herein, applied to said Powers to rent Powers' house on one of said lots in March 1883 or '4; that they agreed upon a monthly rental of two dollars per month to be paid to said Powers for said house as rent; that said Slaght did in more ways than one pay to said Powers or through some one else to him said rent for several months; that he suddenly learned that said land could be claimed as government land after the promulgation of the Guilford Miller decision and without paying rent any further offered his application for lots 10-11-14-15 Sec. 1, Tp. 16 N. R. 45 E. showing that he has resided thereon.

286 The N. P. R. R. Company set up a claim to said land under its withdrawal and selection as indemnity.

Said land appears to be now covered in part by the town of Palouse city; that there are streets laid out thereon and houses built thereon; that the parties who laid out said town based their right upon the title acquired as they believed from the said N. P. R. R. Co.

The first point that presents itself in this case seems to be the question as to whether said land passed to the railroad company under its grant as indemnity or whether it is *now* government land subject to entry.

The second point is, which of the parties interested herein as settlers and claimants is entitled to said land?

We find that said land was excepted from the operation of the maps of definite location of Oct. 4, 1880, and from the operation of the selection by said company Dec. 17, 1883, by the settlement of W. L. Powers. Said settlement has been continuous since 1878 to the present and for this reason under the Guilford Miller decision (7 L. D. page 100) the land must be held as government land at this date.

As to the second point it is clearly shown by the testimony that Slaght settled on said land as the tenant of Powers; that he occupied a house on the land owned by Powers; by this occupation of the premises he could gain no rights as against his landlord, for it is a well settled principle of law which has always been recognized by the land department that a tenant cannot dispute his landlord's title.

We are of the opinion that this land should be held as government land subject to the right of said Powers to purchase said land, from the government under the 5th section of the Act of March 3, 1887, or the act of January 13, 1881, as it appears said Powers holds a warrantee deed from the said N. P. R. R. Co. to said lands.

R. GUICHARD, *Register.*
DAVID J. WILCOX, *Receiver.*

June 5, 1889.

X.

That thereafter the said Northern Pacific Railroad Company appealed from decision to the commissioner of the general land
287 office and the said Jacob Slaght also appealed from that part of said decision adverse to him; that on the 13th day of April, 1895, said commissioner made and entered his decision in said contest in the words and figures set forth in plaintiff's reply herein.

XI.

That thereafter the said defendant Northern Pacific Railroad Company appealed from decision of the commissioner of the general land office to the secretary of the interior, that thereafter said secretary of the interior on the 20th day of May, 1896, made and entered his decision in the words and figures following, to-wit:

Vol. 22, No. 948.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 20, 1896.

NORTHERN PACIFIC R. R. CO.
vs.
JACOB SLAGHT.

Cancellation of Selection. Decision of April 13, 1905 affirmed.

The Commissioner of the General Land Office.

SIR: The Northern Pacific Railroad Company appeals from your office decision of April 13, 1895, cancelling their selection of lots 10, 11, 14 and 15, Sec. 1, Tp. 16, N. R. 45 E., Walla Walla land district, Washington.

The facts are sufficiently stated in your office decision, and having considered the evidence and assignments of error, I find no cause for reversing or modifying said decision and the same is accordingly affirmed.

The papers in the case are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

and on the 20th day of April, 1897, there was made, executed and delivered to Jacob Slaght letters patent under the great seal of the United States, describing therein said lots 10, 11, 14 and 15, Section 1, Township 16 North, of Range 45 East of the Willamette Meridian, which letters patent is in the words and figures following, to-wit:

288 THE UNITED STATES OF AMERICA.

Homestead Certificate No. 2679. Application 5767.

To all to whom these presents shall come, Greeting:

Whereas there has been deposited in the general land office of the United States, a certificate of the register of the land office at Walla

Walla, Washington, whereby it appears that, pursuant to the act of congress approved 20th of May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Jacob Slaght has been established and duly consummated in conformity to the law for the lots numbered ten, eleven, fourteen and fifteen, section one, township sixteen, north of range forty-five east of the Willamette Meridian, in Washington, containing one hundred and sixty acres, according to the official plat of the survey of the said lands returned to the general land office by the surveyor general.

Now know ye, that there is therefore granted by the United States unto the said Jacob Slaght the tract of land above described.

To have and to hold the said tract of land with the appurtenances thereof unto the said Jacob Slaght, and to his heirs and assigns forever subject to any vested and accrued water right for mining, agricultural, manufacturing or other purposes, and the rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local customs, laws and decisions of courts and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted as provided by law.

In testimony — I, William McKinley, President of the United States, have caused these letters to be made patent and the seal of the general land office to be hereunto affixed.

Given under my hand at the city of Washington, on the fourteenth day of April, in the year of our Lord one thousand eight hundred and ninety-seven, and of the independence of the United States the one hundred and twenty-first.

By the President,

WILLIAM McKINLEY,
By M. McKEAN, *Secretsry.*

289 Recorded Vol. 6 A. Page 248. [SEAL.]
Received and recorded the 4th day of May, 1897, at 8:50 o'clock A. M. at the request of Jacob Slaght.

JOHN TOBIN,
County Auditor.

XII.

That said Spokane and Palouse Railway Company constructed and completed a railroad upon, over and across said government lots ten and eleven during the year 1886 and the first half of the year 1887, and that prior to the construction of said railroad, survey of said road had been made and staked out over and across said premises, and the road so constructed conformed to the survey so made and staked out as aforesaid, and from and after the completion of said railroad it was operated, daily and continuously in carrying of freight, passengers and United States mail, and that exhibit A attached to the answers herein shows the line of road as staked out, located, constructed and operated as aforesaid. That before the location

and construction of said railroad and in the month of April, 1886, the said Spokane and Palouse Railway Company filed with the secretary of the interior of the United States a copy of its articles of incorporation and due proofs of its organization under the same and the filing of said papers was duly approved by said secretary of the interior on or about May 11, 1886; that after the location and construction of said railroad said Spokane and Palouse Railway Company filed in the United States district land office for the district within which said premises were situated a map or profile of its road showing the line thereof extending over and across said lots ten, eleven, fourteen and fifteen, of said section one, township sixteen north, range forty-five east W. M. and extending from a point at Belmont, Whitman county, Washington Territory, to a point at Genesee, Nez Perces County, Idaho territory, a distance of seventy-two and thirty-seven hundredths (72.37) miles; and thereafter said map was duly transmitted by the officer of said district land office to the secretary of the interior and said map and filing thereof was thereafter duly approved by said secretary of the interior on or about June 27, 1888.

290 XIII.

That in the construction of said railroad which runs from Spokane, Washington, to Lewiston, Idaho, said Spokane and Palouse Railway Company expended a large sum of money, and was at a great expense in so doing.

XIV.

That at the time of the construction of said railroad, the plaintiffs resided upon said land, and in a house located at a point within fifteen feet of the rails of the main line, and at a point about fifty feet west of government lots nine and ten in said section one, and by observation knew that the said road was being constructed and that large sums of money were being expended and paid out on account of said road, and that said railroad was being constructed for carrying freight and passengers thereon and thereover, and knew that the Spokane and Palouse Railway Company then and thereafter claimed a right of way one hundred (100) feet wide on either side of said main line, and knew of the making and marking of the survey so made as aforesaid.

XV.

That at the time when the surveyors first entered upon said land for the purpose of surveying and locating said railroad, the plaintiff published in the Palouse News, a weekly newspaper printed and published at Palouse City, Washington, a notice as follows: "Notice is hereby given to all persons whomsoever not to trespass on my homestead claim which is, lots 10, 11, 14 and 15, Sec. 1, Tp. 16, N. R. 45 E. W. M. Whitman County, W. T. Signed Jacob Slaght," which was the only notice or formal objection which the plaintiff made to the construction of said railroad.

XVI.

That in August, 1887, the said Northern Pacific Railroad Company, claiming to be the owner of said lots 10 and 11, sold and conveyed the same by deed of conveyance containing the usual covenants and warranties to William L. Powers, and that afterwards on the 14th day of September, 1887, the said William L. Powers and wife conveyed by deed of conveyance to the Spokane and
291 Palouse Railway Company a tract of land for a right of way 200 feet wide, being the land shown and marked in defendant's Exhibit A in their answer, as the tract occupied by the defendant Northern Pacific Railway Company, as its right of way.

XVII.

That on the 12th day of May, 1897, said Spokane & Palouse Railway Company, W. L. Powers, Hattie Dean, Edward Dean, F. S. Bell, Ivan Chase, J. K. McCornack, Ann J. Clyde, J. H. Mahhern, Spokane & Palouse Land Company a corporation, Palouse Mill Company, a corporation, and A. F. Pugh, who were the grantees of the said William L. Powers, filed in the superior court of Whitman county, Washington, their complaint against the said Jacob Slaght, for the purpose of having the said Jacob Slaght declared a trustee and as holding said land in trust for the plaintiff and directing a conveyance from him to the plaintiffs and enjoining the said Jacob Slaght from bringing any action to oust the defendants, and subsequently they filed a second amended complaint which amended complaint and prayer are fully set forth in the plaintiff's reply herein.

XVIII.

That the said Jacob Slaght demurred to said amended complaint, and said demurrer was by the court sustained, the order sustaining said demurrer being set out in plaintiff's reply herein.

XIX.

That thereafter on to-wit the 24th day of June, 1898, the plaintiffs in said action appealed from said order and final judgment sustaining the said demurrer to the complaint, to the supreme court of the state of Washington, and that thereafter on the 14th day of January, 1899, the supreme court of the state of Washington made and entered its judgment in said cause in the words and figures set out in plaintiff's reply herein.

XX.

That theerafter the said plaintiffs took said cause to the supreme court of the United States on a writ of error and the said supreme court of the United States having considered the same, on the 14th day of January, 1899, affirmed the said judgment of said supreme court of the state of Washington, as aforesaid.

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XXI.

That after the said Jacob Slaght and Margaret A. Slaght were divorced as aforesaid, and on to-wit, the 27th day of July, 1901, the said Margaret A. Slaght executed and delivered a warranty deed in the usual form to said Jacob Slaght in which deed the land described in plaintiff's complaint was included, set out and described therein and stated that the property described in said deed was to be his sole and separate property, and the said Margaret A. Slaght did not, nor did the said Jacob Slaght make any transfer or conveyance of any kind, of any portion of said government lots 10 and 11 except as aforesaid, prior to the 23d day of February, 1901, unless the facts herein stated constitute a transfer or conveyance.

XXII.

That on the 21st day of February, 1899 the Spokane and Palouse Railway Company conveyed all of its right, title, interest and estate in and to the right of way over and across lots 10 and 11, section 1, as aforesaid, together with all its property to the defendant Northern Pacific Railway Company, and that ever since then the said Northern Pacific Railway Company has maintained and operated said road in the carrying of freight, passengers and United States mail from Spokane, Washington to Lewiston, Idaho, and intervening points.

XXIII.

That on the 21st day of February, 1899, when the said Spokane & Palouse Railway Company transferred and conveyed its interest in and to the right of way over and across lots 10 and 11 as aforesaid, to the defendant the Northern Pacific Railway Company, the said Spokane & Palouse Railway Company had not, nor had the Northern Pacific Railway Company acquired from the plaintiff by deed, grant or conveyance of any kind, unless the facts herein found amount thereto, nor had the Spokane and Palouse Railway Company nor the Northern Pacific Railway Company acquired by condemnation proceedings against plaintiff, any right over and across said land, and the said defendant Northern Pacific Railway Company has not since said date received from plaintiff any deed, grant or conveyance of any kind, other than the facts herein shown, nor has
293 it acquired any right to the lands described in the complaint by condemnation proceedings against plaintiff for right of way over and across said land.

XXIV.

That the plaintiff was not asked for nor did he give his consent (unless the *facts* herein found show such consent) to the location, construction or erection of said railroad over and across said lots at the place where the same was located, or at any other place, over and across said lots, nor did the plaintiff make any formal protest or

objection to the construction of said road, other than said notice contained in said notice published in the paper as aforesaid and in the proceedings in the United States land office and in the state and federal courts as herein set forth.

XXV.

That without any objection on the part of plaintiff (other than the publication of said notice) there has been constructed upon said right of way on the premises in controversy valuable and lasting improvements in the shape of railroad bridges water tank and warehouses, which would be practically of no value should the road and right of way of defendant Northern Pacific Railway Company be changed from the premises in controversy.

That it would be a great expense to defendant, Northern Pacific Railway Company, to change its line of road and right of way over the premises in controversy, and that some of the improvements of said road consisting of bridges and water tank, and embankments would be of no practical value, should the road or right of way be changed from the premises in controversy.

XXVI.

That the defendant Northern Pacific Railway Company does not claim any part or portion of lots 10 and 11, section 1, as aforesaid, except a strip 200 feet wide, being 100 feet on each side of the center of the said road over and across said lots, as the same is now constructed, shown and designated on the plat marked Exhibit A and attached to the answer herein.

294 XXVII.

That the defendants John Miller and Anna Miller, his wife, and the Washington Grain and Milling Company, a corporation, are the owners of and operating warehouses situated, designated and located on said plat marked Exhibit A of defendants' answer, said warehouses having been constructed and erected on said land, under a grant or lease of premises from the said Northern Pacific Railway Company, or its grantor, the Spokane and Palouse Railway Company, but without permission of the plaintiff herein (unless the facts herein found show such consent.)

XXVIII.

That the builders of said warehouses knew, and the Spokane & Palouse Railway Company knew, or could have known had they made inquiry, that the question of the title to said land, and that portion thereof claimed by the said Northern Pacific Railway Company, was in controversy in the land department of the United States undecided and undetermined as in the manner and at the time and dates hereinbefore set forth.

XXIX.

That the said warehouse now occupied by John A. Miller was partially built in 1892 by C. S. Farnsworth and J. T. Waters, and prior to the construction thereof the plaintiff notified the said Farnsworth and Waters not to construct said warehouse on said land; and also stated to them that said land belonged to plaintiff, and the right thereto was in contest and pending in the United States land office undetermined. That said Miller has built additions to said warehouse.

XXX.

That during the time that all of said warehouses were being constructed the plaintiff was residing upon said government lots 10 and 11, section 1, as aforesaid, and on that portion thereof as set forth in paragraph XIV, now claimed by the defendant Northern Pacific Railway Company as its right of way.

XXXI.

That no suit or action was brought by plaintiff to prevent or restrain the erection, construction or maintenance on the premises in controversy of the said railroad or any of said warehouses, nor to procure the possession thereof or damages for the retention of the same, prior to the commencement of this action, and that this action was commenced within a few months and as soon as practicable after the decision of the supreme court of the United States, affirming the decision of the supreme court of the state of Washington.

XXXII.

That said township sixteen north, of range forty-five east,
295 was surveyed by the United States in the year 1874 and a plat thereof duly approved was filed in the district land office at Walla Walla, Washington Territory, on the 2nd day of April in the year 1875 and said government lots 10, 11, 14 and 15 were at the date of filing said plat and survey, and thereafter remained, except for the claim of said Jacob Slaght and the Spokane & Palouse Railway Company, public lands of the United States not reserved.

XXXIII.

That the defendants herein other than the Northern Pacific Railway Company are tenants of said railway company, and have and hold possession of portions of the premises described in the complaint only as such lessees for a short period of time, and as warehousemen, and have warehouses erected on the parts thereof leased to them, and they receive and accept as warehousemen all grain tendered to them to the extent of their capacity, for shipment over the line of the Northern Pacific Railway Company.

XXXIV.

That it would be possible for the defendant Northern Pacific Railway Company to carry freight, passengers and U. S. mail from Spokane, to and from Lewiston, Idaho, through Palouse Washington, on or over a right of way across plaintiff's land, not exceeding 25 feet wide and a space 100 feet square would permit the erection of a depot at Palouse, but great inconvenience would result to the citizens of Palouse and vicinity and to the said railway company if this were all the facilities had by said railway company for receiving and delivering freight and passengers and U. S. mail; that for the convenience, prompt and expeditious receipt and delivery and shipment and handling of freight and for the erection of warehouses and elevators for the storing of freight and wheat at Palouse, Washington, it is necessary to have in addition to the main track, depot, switches, turnouts, warehouses, water tanks, elevators and other structures which require a- right of way a space as large as that claimed by the defendant railway company as shown by the exhibit attached to its answer, that is, the whole of the premises in controversy in this action.

XXXV.

296 That said town of Palouse is a thriving municipal corporation of the third class, and was organized and incorporated under the laws of the state of Washington, on the 17th day of June, 1889, and the territory included in the limits thereof, at the date of its organization was the following to-wit:

Commencing at the northeast corner of lot three (3) in section six (6), in township sixteen (16) north of range forty-six (46) east of the Willamette Meridian in Whitman county, state of Washington, running thence west along the township line one (1) mile to the center line of section one (1) in said township sixteen (16) north of range forty-five (45) east of the Willamette Meridian, running thence south along the center line of section one (1) aforesaid 285 rods thence running due east parallel with the north boundary line thereof one (1) mile to a point on the east line of southeast quarter (SE ¼) of northwest quarter (NW ¼) of the said section six (6) aforesaid, running thence north parallel with the west boundary line thereof to the North Palouse river, thence easterly up said river to a point in said river where the east line of Winfield street in Fisher's addition to Palouse City, Washington, as shown upon the recorded plat thereof now of record in the auditor's office of Whitman county, Washington, produced south, will cross said river, being about 690 feet east of the east line of said lot three (3) in section six (6) aforesaid, running thence north to the center line of Idaho avenue in said Fisher's addition aforesaid, running thence west along the center line of Idaho avenue to the east line of lot three (3) in section six (6) in said township sixteen (16) aforesaid, and thence running north to the township line the place of beginning, lying, situated and being in section one, in township sixteen (16) and range forty-five (45) E. W. M. aforesaid, and in section six (6) township sixteen (16) range forty-six (46) E. W. M. aforesaid.

XXXVI.

That the land involved in this action in much greater in value now than it was in 1886 or 1887; that said railway company has increased the value thereof to some extent, and there has been a general rise in values of all lands in the vicinity of the land involved in this action.

XXXVII.

On the 3d day of December, 1901, the county commission-
297 ers of Whitman county, Washington, by an order entered upon their records and delivered to the county treasurer ordered that all taxes levied and assessed against said government lots 10 and 11, section 1, aforesaid, for the year 1896 and all prior years be cancelled and the same were by said treasurer cancelled upon the tax rolls of said county, and on the 4th day of August, 1902, said board of county commissioners of Whitman county made and entered an order on their records cancelling all the taxes for the year 1897-8-9-1900 and 1901 levied and assessed against lots and blocks in Powers addition to Palouse contained within said government lots 10 and 11 aforesaid, and for said years 1897-8-9-1900 and 1901 said government lots 10 and 11 have been assessed to Jacob Slaght and Margaret A. Slaght and to their respective grantees without deduction therefor for said right of way. That the defendant Northern Pacific Railway Company and its grantor Spokane and Palouse Railway Company during all of said years and ever since the year 1886 were and have been assessed for state and county taxes on its said road in Whitman county, at the uniform rate of a certain sum per mile for main tracks and — certain sum per mile for side tracks which include the right of way owned or claimed by said company in said county.

Conclusions of Law.

From the foregoing findings of fact the court deduces the following conclusions of law:

That the defendant the Northern Pacific Railway Company is the owner of a right of way two hundred feet in width over and across said lots ten, eleven, fourteen and fifteen, of section one, township sixteen, north of range forty-five east, Willamette Meridian, Whitman county, Washington, which said right of way is bounded by two lines each parallel with and distant one hundred feet from the center line of the main track of the railway of said Northern Pacific Railway Company now located and operated over and across said lots ten, eleven, fourteen and fifteen, and said defendant Northern Pacific Railway Company is entitled to the exclusive possession of said strip of land last above described and that the defendants John
A. Miller and Anna Miller, his wife, and the Washington
298 Grain and Milling Company are rightfully in possession of these respective portions of said strip of land now occupied

by them as tenants of said defendant Northern Pacific Railway Company. That the above entitled action be dismissed and that the defendants are entitled to their costs and disbursements incurred in defending this action.

By the court

—— ——, *Judge.*

The above and foregoing findings and conclusions were presented and requested by defendants before the court made, signed or filed findings or conclusions, or rendered decree herein. To the refusal to make, sign or file the same defendants excepted, and exception allowed.

Dated this 9th day of June, 1904.

CHESTER F. MILLER, *Judge.*

299 In the Superior Court of the State of Washington in and for the County of Whitman.

No. —.

JACOB SLAGHT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING COMPANY, a Corporation, Defendants.

Findings of Fact Proposed by Defendants.

Come now the defendants above named and each of them, and (before the court has made or filed findings of fact or conclusions of law herein) present, propose and request the court to make a finding of fact as follows, to-wit:

I.

That before the construction of the railroad of said Spokane and Palouse Railway Company across the premises in controversy, and before May 11th, 1886, the said Spokane and Palouse Railway Company filed with the Secretary of the Interior of the United States a copy of its articles of incorporation and due proofs of its organization under the same, and the filing thereof was duly approved by the secretary of the interior on or about May 11th, 1886.

II.

That after the construction of its railroad across the premises in controversy the said Spokane and Palouse Railway Company filed in the United States district land office, for the district in which said premises were situated, a map or profile of its road showing the line thereof extending over and across the premises in controversy, and thereafter said map was duly transmitted by the officers

of said district land office to the secretary of the interior and said map and the filing thereof duly approved by said secretary of the interior on or about July 27th, 1888.

Conclusions of Law.

That the Spokane and Palouse Railway Company the predecessor in interest of the defendant Northern Pacific Railway Com-
300 pany acquired a right of way two hundred (200) feet in width, viz., one hundred feet on each side of the center of the defendant railway company's railroad under and by virtue of that certain act of congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3rd, 1875; and by virtue thereof the defendant the Northern Pacific Railway Company, and the other defendants as its lessees are rightfully in possession under said act of congress — the premises described in the several answers of the several defendants.

The above and foregoing findings and conclusions were presented and requested by defendants before the court made, signed or filed findings or conclusions, or rendered decree herein. To the refusal to make, sign or file the same defendants excepted and exception is hereby allowed.

Dated this 9th day of July, 1904.

CHESTER F. MILLER, *Judge.*

301 STATE OF WASHINGTON, *County of Whitman, ss:*

I, C. F. Miller, judge of the superior court in and for the county of Columbia, state of Washington, and who held session of the superior court of Whitman county, Washington, at which the above entitled action was tried, and who tried the above entitled action and all the issues therein, to-wit, Jacob Slaght, plaintiff, *vs.* Northern Pacific Railway Company, a corporation; John A. Miller and Anna Miller, his wife, and the Washington Grain & Milling Company, a corporation, defendants, numbered — in the superior court of said Whitman county, in place of S. J. Chadwick, judge of the superior court in and for the county of Whitman, Washington, do hereby certify that the above and foregoing matters and proceedings embodied in the foregoing statement of facts are matters and proceedings occurring in the cause; that the same are thereby and hereby made a part of the record therein and herein; that the said statement of facts contains all the evidence, facts, matters and proceedings heretofore occurring in the said cause and not already a part of the record therein; that it is settled, allowed and certified as and for a statement of facts upon the trial and in the cause of each of the several defendants in said action and of said plaintiff; that the findings of fact and conclusions of law made, found and filed in said cause were made and found on the 9th day of July, 1904, in the absence of the defendants and their counsel and were afterwards filed with the clerk of the court on the 13th day of July,

1904, and said findings of fact and conclusions of law were served on defendants on July 14th, 1904; that the said statement of facts was filed within thirty days after the rendition and entry of decree in said action, and after being filed was duly served upon all parties who have appeared in said action, which service was within thirty days after entry of decree; that amendments having been proposed and duly considered and settled by the court, the above and foregoing statement of facts has been, and is hereby, settled and certified as the statement of facts herein as to each and all of the defendants and of the plaintiff in said action; that the plaintiff
302 and each and all of the defendants had due and regular notice of application to the court for settling and certifying said statement of facts, which notice specified the time and place as authorized and required by law (not less than three or more than ten days after service of notice); that due and legal notice of settling and certifying said statement of facts was made, given and served, and all parties who have appeared in said action and who proposed any amendments or filed any exceptions have appeared in response to said notice, and were present and participated in the hearing of said amendments and exceptions, and the settling and certifying of said statement of facts.

Done in open court this 10th day of September, 1904.

CHESTER F. MILLER, *Judge.*

Filed in the office of clerk of superior court, Sep. 10, 1904.

W. O. McCAW, *Clerk,*
By GEO. L. CORNER, *Deputy.*

303 In the Supreme Court of the State of Washington.

No. —.

MARGARET A. SLAGHT, Respondent (Plaintiff),

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; TACOMA GRAIN COMPANY, a Corporation; PUGET SOUND WAREHOUSE COMPANY, a Corporation, and WILLIAM FAGAN, Appellants (Defendants).

No. —.

JACOB SLAGHT, Respondent (Plaintiff),

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Appellants (Defendants).

Stipulation.

Subject to the approval of the supreme court of the State of Washington:

It is hereby stipulated and agreed, by and between the parties to the above entitled causes and each of them, by their respective

attorneys, that said cases and each of them shall be submitted to the supreme court of the state of Washington upon brief in the case of Jacob Slaght *vs.* Northern Pacific Railway Company *et al.;* and that service and filing of brief in said case of Jacob Slaght *vs.* Northern Pacific Railway Company, *et al.,* shall be taken and considered also as service and filing of brief in the case of Margaret A. Slaght *vs.* Northern Pacific Railway Company *et al.,* and that no brief shall be served or filed by either party in said case of Margaret A. Slaght *vs.* Northern Pacific Railway Company *et al.*; and that said supreme court, in rendering its decision and opinion upon appeal in the case of Margaret A. Slaght *vs.* Northern Pacific Railway Company, *et al.,* shall render and file such decision and opinion upon the record in said case and upon the brief in said case of Jacob Slaght *vs.* Northern Pacific Railway Company, *et al.;* and upon motion of either of the parties to the above entitled actions an order may be made
304 and entered by said supreme court in accordance with this stipulation.

THOMAS NEILL &
A. A. WILSON,
Attorneys for Respondent (Plaintiff) Margaret A. Slaght.
THOMAS NEILL &
W. E. McCROSKEY,
Attorneys for Respondent (Plaintiff) Jacob Slaght.
STEPHENS & BUNN,
JOHN M. BUNN,
JAMES B. KERR,
Attorney- for Appellants (Defendants).

In the Supreme Court of the State of Washington.

No. —.

MARGARET A. SLAGHT, Respondent (Plaintiff),
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; TACOMA GRAIN COMPANY, a Corporation; PUGET SOUND WAREHOUSE COMPANY, a Corporation, and WILLIAM FAGAN, Appellants (Defendants).

No. —.

JACOB SLAGHT, Respondent (Plaintiff),
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Appellants, (Defendants).

Order.

It appearing from the stipulation of the parties to the above entitled actions, on file herein, that it has been stipulated and agreed

that said cases and each of them shall be submitted to this court upon brief in the case of Jacob Slaght *vs.* Northern Pacific Railway Company *et al.*, and that no brief shall be served or filed in the case of Margaret A. Slaght *vs.* Northern Pacific Railway Company *et al.*, and that service and filing of brief in said case of Jacob Slaght *vs.* Northern Pacific Railway Company *et al.* shall be taken and considered as service and filing of brief in said case of Margaret A. Slaght *vs.* Northern Pacific Railway Company *et al.*, and the
305 court being fully advised in the premises, upon motion of appellants (defendants) in the above entitled cases therefor-, it is hereby

Ordered that the above entitled cases and each of them be submitted to this court upon brief in the case of Jacob Slaght *vs.* Northern Pacific Railway Company *et al.*, and that service and filing of brief in said case of Jacob Slaght *vs.* Northern Pacific Railway Company *et al.* shall be taken and considered as also service and filing of brief in the case of Margaret A. Slaght *vs.* Northern Pacific Railway Company *et al.*, and that no brief shall be required to be served or filed in said case of Margaret A. Slaght *vs.* Northern Pacific Railway Company *et al.*; and that this court in rendering its decision and opinion upon appeal in said case of Margaret A. Slaght *vs.* Northern Pacific Railway Company *et al.* will render and file and enter its decision and opinion upon the record in said case and upon the brief in said case of Jacob Slaght *vs.* Northern Pacific Railway Company *et al.*

Done in open court this 14 day of March, 1904.

MARK A. FULLERTON,
Chief Justice.

Indorsed: No. 5429. Filed Nov. 14, 1904. C. S. Reinhart, Clerk, F. S. Guyot, Dep.

306 In the Supreme Court of the State of Washington.

JACOB SLAGHT, Respondent,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING COMPANY, a Corporation, Appellants.

It is hereby stipulated and agreed by and between Thomas Neill, attorney for respondent, and John M. Bunn, attorney for appellant that the said respondent shall have, and is hereby given an additional thirty days to that allowed by law, in which to serve and file his brief herein.

Dated this — day of January, 1905.

THOMAS NEILL,
Attorney for Respondent.
JAMES B. KERR,
JOHN M. BUNN,
Attorney- for Appellants.

Indorsed: No. 5429. Stipulation as — filing brief. Filed Feb. 2, 1905. C. S. Reinhart, Clerk.

307 In the Superior Court of the State of Washington in and for Whitman County.

No. —.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Defendant-.

Summons.

STATE OF WASHINGTON, *County of Whitman, ss:*

The State of Washington to the said Northern Pacific Railway Company, a corporation; John A. Miller and Anna Miller, his wife, and The Washington Grain and Milling Company, a corporation, defendant-:

You are hereby summoned and required to appear in the superior court of the state of Washington, in and for Whitman county, and defend the above entitled action in the court aforesaid, and answer the complaint of the plaintiff in the above entitled action, and serve a copy of your said answer on Charles M. Wyman, the person whose name is subscribed to this summons, at his office in Colfax in the county of Whitman, state of Washington, within twenty days after the day of the service of this summons upon you, exclusive of the day of such service, and if you fail to appear and defend said action and answer the complaint of the plaintiff aforesaid, within the time aforesaid, judgment will be rendered against you, according to the demand of the said complaint, a copy of which is hereto annexed, and herewith served upon you.

CHARLES M. WYMAN,
Plaintiff's Attorney.

Postoffice address Colfax, Whitman County, Washington.

308 In the Superior Court of the State of Washington in and for Whitman County.

JACOB SLAGHT, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING COMPANY, a Corporation, Defendants.

Affidavit of Service.

STATE OF WASHINGTON, *County of Whitman, ss:*

Frank Beste, being first duly sworn, on oath deposes and says that at all the time herein mentioned he was and now is a citizen

of the state of Washington over the age of twenty one years, competent to be a witness in the above entitled action, but not a party thereto. That in Whitman county, Washington, on the ninth day of October, A. D. 1901, between the hours of 8 o'clock A. M. and 6 o'clock P. M., he personally served upon the defendants, the Northern Pacific Railroad Company, a corporation, and John A. Miller, and Anna Miller, his wife, and upon each of them personally the summons and complaint in the above entitled action, upon said defendant The Northern Railway Company by delivering to and leaving with J. R. Ryerson personally, a true copy of the summons and complaint in the above entitled action, each copy being certified to as being such by Chas. M. Wyman, one of the attorneys for plaintiff herein, said J. R. Ryerson, being then and there the agent for said railway company at Palouse, Washington; upon the defendants John A. Miller and Anna Miller and each of them by then and there delivering to and leaving with said John A. Miller and Anna Miller, and each of them personally a true copy of the summons therewith a true copy of the complaint in said action, each copy having been certified to as being a true copy by Chas. M. Wyman, one of the attorneys for plaintiff in said action.

FRANK BESTE.

Subscribed and sworn to before me this 11th day of October, 1901.

W. E. McCROSKEY,

[SEAL.] *Notary Public, Resident Palouse City, Washington.*

309 *Sheriff's Return of Service.*

STATE OF WASHINGTON, *County of Spokane, ss:*

I, W. J. Doust, sheriff in and for said county and state, do hereby certify that I served the within summons and complaint on the Washington Grain & Milling Company the within named defendant, in Spokane county, State of Washington, on the 18th day of October, 1901, by delivering to and leaving with Justus K. Smith, M'n'g'r of said company, said defendant personally a true copy of said summons & complaint certified to be such by Chas. M. Wyman.

Return this 19th day of October, 1901.

W. J. DOUST,
Sheriff of Spokane County, Washington,
By J. M. HONE, *Deputy.*

Sheriff's Fees.

Copy	
Service	$.60
Mileage	.20
	$.80

STATE OF WASHINGTON, *County of Whitman, ss:*

I, W. O. McCaw, clerk of the superior court of the state of Washington, for Whitman county, do hereby certify that the above and foregoing is a true and correct copy of original summons with services of same in the above entitled cause, as the same now appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 6th day of January, A. D. 1905.

[SEAL.] W. O. McCAW, *County Clerk.*

Indorsed: Supplemental Transcript. 5429. Filed Jun- 24, 1905. C. S. Reinhart, Clerk.

310 No. 5429.

JACOB SLAGHT, Respondent,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN AND MILLING COMPANY, a Corporation, Appellants.

Filed Aug. 14, 1905.

In March 1883 the plaintiff in this action established his residence on lots 10, 11, 14, and 15, of section 1, township 16 north, of range 45 east, of the Willamette Meridian, in Whitman county, and continued to reside thereon until the year 1897. On the 31st day of October, 1887, he made application at the proper land office to enter said lands under the homestead laws of the United States, alleging settlement on the 4th day of March, 1883. The Northern Pacific Railroad Company, having prior to said application selected said tracts as indemnity, under the act of July 2, 1864, was notified of the plaintiff's application by the register and receiver of the local land office. The contest thus instituted was carried by appeal to the secretary of the interior and resulted in a final decision in the plaintiff's favor on the 20th day of May, 1896. On the 20th day of April, 1897, a homestead patent issued to the plaintiff. During the year 1886 and the first half of the year 1887 the Spokane and Palouse Railway Company, a corporation organized and existing under the laws of the territory of Washington, constructed and completed a railroad upon and over lots 10 and 11 above described at great expense; and ever since such construction said railroad has been operated daily, carrying freight, passengers, and United States mail.

311 Since 1886 the Spokane and Palouse Railway Company and its successor in interest have claimed a right of way over said lots 10 and 11 for said railway 100 feet wide on each side thereof. It would be possible for the Northern Pacific Railway Company, successor in interest of the Spokane and Palouse Railway Company, to carry freight, passengers, and United States mail, over a right of way across said described lands not exceeding twenty-five feet in width, and a space one hundred feet square would permit

of the erection of a depot at the town of Palouse; but great inconvenience would result to the citizens of Palouse and vicinity, and to said railway company, if these were all the facilities had for receiving and delivering freight, passengers and mail. For the convenient, prompt and expeditious handling of freight and the erection of warehouses and elevators for the storing of grain and wheat, it is necessary to have a right of way two hundred feet in width across said land, as claimed by the railway company. At the time said railway was surveyed and constructed the plaintiff resided upon said lands, knew of its construction and of the expenditure of large sums of money in such construction. About the time the surveyors entered upon said lands, the plaintiff published a notice in the Palouse News, a newspaper printed and published in the vicinity of the land, forbidding all persons to trespass thereon, but this was the only objection made to the construction of the road. In the month of August 1887 the Northern Pacific Railroad Company, claiming to be the owner of lots 10, 11, 14 and 15 above described, conveyed the same to one William L. Powers, and on the 14 day of Sept. 1887, Powers conveyed to the Spokane and Palouse Railway Company, a right of way two hundred feet wide across said lots 10 and 11, being the same right of way then claimed by the Spokane and Palouse Railway Company, and now claimed by the Northern Pacific Railway Company. On the 12th day of May, 1897, the Spokane and Palouse Railway Company, William L. Powers, and others, as successors in interest of Powers, under the above deed of conveyance from the Northern Pacific Railroad Company, brought an action in the superior court of Whitman county for the purpose of
312 having the plaintiff in this action declared a trustee of lots 10, 11, 14 and 15 above described for the plaintiffs in said last mentioned action. A demurrer to the complaint is said action was sustained and a final judgment entered for the defendant therein, the plaintiff herein. Said judgment was thereafter affirmed by the supreme court of the state of Washington and by the supreme court of the United States. No suit or action of any kind was commenced by this plaintiff to recover the possession of said right of way, or to enjoin or restrain the construction of said road or its maintenance over said right of way, or to recover damages for the taking or retention of said right of way, prior to the commencement of this action. This action was commenced shortly after the decision of the supreme court of the United States in the action above referred to. The summons was served on the Northern Pacific Railway Company on the 9th day of October, 1901, and the complaint filed on the 4th day of June, 1902. The Spokane and Palouse Railway Company conveyed the right of way in controversy to the Northern Pacific Railway Company on the 21st day of February, 1889. The foregoing facts and others not deemed material are set forth in the pleadings and agreed to by the parties. This action was brought to recover the possession of the right of way above referred to across lots 10 and 11. The court below awarded to the plaintiff the possession of all of said right of way, except a strip of land twenty-five feet in width along which the road is constructed, and a parcel of land one hundred feet square for a depot site, but

stayed execution on the judgment for a period of ninety days, in order that the Northern Pacific Railway Company might have an opportunity to condemn and appropriate the remainder of the right of way. From the judgment so entered the defendants appeal.

From the foregoing facts the appellants make the following contentions: first, that the Northern Pacific Railway Company, as successor in interest of the Spokane and Palouse Railway Company, has a right of way two hundred feet in width across said lots
312½ 10 and 11 by adverse possession under the laws of the state of Washington; second, that the Northern Pacific Railway Company, as successor in interest of the Spokane and Palouse Railway Company, has a right of way two hundred feet in width across said lots 10 and 11 under the act of Congress of March 3, 1875, granting rights of way over public lands to certain railway companies; and third, that inasmuch as the Northern Pacific Railway Company is in possession of the right of way, using the same for public purposes, a possessory action to recover the land will not lie.

1. The Northern Pacific Railway Company and its predecessor in interest have held the right of way in controversy openly, notoriously, adversely, and under color of title and claim of right for more than ten years prior to the commencement of this action, and unless there was something in the nature of the respondent's title, or in the pending litigation that prevented the operation of the state statute of limitation, the defense of adverse possession must prevail. The appellants contend that the respondent, by virtue of his settlement rights might have enjoined the Spokane and Palouse Railway Company from entering upon the land or from interfering with his possession or might have recovered damages for injury to his possession in an action at law. This is no doubt true; but the respondent holds title under a patent from the United States, and he contends that the state statute of limitations was dormant until patent issued. This presents a federal question and we must look to the decisions of the supreme court of the United States for our guidance. Under the laws of Missouri, a homesteader or preemptioner may maintain an action of ejectment from the date of his filing to recover possession of the land embraced in his entry. By reason of this fact the supreme court of that state held that the state statute of limitations commenced to run as soon as the right of entry accrued, notwithstanding the title was in the United States. The case was taken to the supreme court of the United States, and in Gibson *v.*
313 Chouteau, 13 Wall. 92, the judgment was reversed, the court saying:

"But neither in a separate suit in a federal court nor in answer to an action of ejectment in a state court, can the mere occupation of the demanded premises by plaintiffs or defendants for the period prescribed by the statute of limitations of the state, be held to constitute a sufficient equity in their favor to control the legal title subsequently conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the

patent, under state legislation, in whatever form or tribunal such occupation be asserted."

In a later case, McIlhiney *v.* Fickle, 61 Missouri, 329, the supreme court of Missouri says:

"The supreme court of the United States in Gibson *v.* Chouteau, (13 Wall. 92.) have held, that although the patent has issued to the same person who entered the land and although our statute allows the holder of the entry to get possession by ejectment, so soon as his entry is made and although our statute of limitations begins to run from the date of the right of entry, yet as the legal title remained in the United States after the entry and up to the date of patent, our statute of limitation had no effect as a bar, because it interfered with the primary disposal of the soil."

The doctrine of the Gibson case is reaffirmed in Redfield *v.* Parks, 132 U. S. 239, where it is held that the doctrine of relation does *does* not apply in such cases, and that the state statute of limitations does not commence to run, even upon issuance of final receipt, after full payment. In the latter case the patent did not issue for nineteen years after final receipt. This rule has been uniformly followed in the state courts. The plea of title by adverse possession cannot therefore prevail.

2. Has the appellant railroad company a right of way under the act of March 3, 1875? This act undoubtedly grants a right of way over all public lands and the grant attaches immediately upon compliance with the requirements of the act. And, as held by the court in Jamestown and Northern Railway Co. *v.* Jones, 177 U. S. 125, a settler upon the land after the grant attaches, takes it subject to the grant. We are of the opinion, however, that the grant does not attach to lands occupied by a settler and subject to his settlement rights, until after the condemnation provided for in Section 3 of the act. It seems to have been the purpose of Congress to grant
314 a full and complete right of way over lands occupied by a settler, as soon as the settler's rights were acquired by condemnation, and not to grant the right over occupied lands, independent of condemnation. If lands along the line of the road are occupied by a settler and his rights are not acquired by condemnation and afterwards ripen into a patent from the government, he acquires the full legal title, free from any claim on the part of the company. This precise question—in fact every question involved in this case—was before the supreme court of Colorado in Denver R. G. R. Co. *v.* Wilson 62 Pac. 843. In that case Wilson the plaintiff, filed upon the land over which the right of way was claimed, under the pre-emption laws of the United States, on the 20th day of June, 1885. In July 1887, after complying with all the requirements of the act of 1875, except to condemn the rights of Wilson, the railway company defendant obtained a deed to the right of way from one Bennet, who was holding the lands adversely to Wilson and contesting his rights before the department. The railway company immediately entered into possession of the right of way and built its road. On July 15, 1896, Wilson obtained a patent for the land from the United States, and soon thereafter brought an action of ejectment, styled an action

to recover possession of real property by the Colorado Code, to recover possession of the right of way. The defendant there as here claimed a right of way under the act of 1875, under the state statute of limitations and by estoppel. The court held, however, that the railway company acquired no rights over the pre-emption claim of the plaintiff without condemnation, and that the full legal title inured to him under the patent from the United States. In answer to the plea of the statute of limitations the court said: "The authorities are that, as between rival individual claimants over land acquired from the United States government the statute of limitations does not begin to run in favor of an adverse claimant in possession, as against an entryman, until the latter, by a full compliance with the law, becomes entitled to a patent." In Larsen *v.* O. R. N. Co. 19 Or. 240, it was held that a railway company acquired no rights
315 under the act of 1875 as against a homestead claimant, without condemnation. In Enoch *v.* Spokane Falls, etc., Ry. Co. 6 Wash. 393, this court held that the grant under the act of 1875 "is not operative upon lands to which private rights have previously attached." See, also:

Railway Company *v.* Sture, 32 Minn. 95,
Railroad Company *v.* Jones, 7 N. Dak. 619.

We think the decisions of the supreme court of the United States in Railroad Company *v.* Osborn, 160 U. S. 103, and Spokane Falls, etc., Railway Co. *v.* Zeigler, 167 U. S. 65, arising under the act of 1875 tend to sustain these conclusions. We are therefore of opinion that the appellants have no rights, as against the respondent under the act of 1875.

3. Can a possessory action be maintained to recover the possession of a railroad right of way under the circumstances disclosed by the record before us? In Biles *v.* Tacoma, Olympia, etc. Railway Company, 5 Wash. 509, a similar case, a judgment in ejectment in favor of the plaintiff was affirmed by this court, but the right to maintain such an action was not discussed. It appears from the dissenting opinion in Downs *v.* Seattle & Montana Ry. Co. 5 Wash. 778, that the judgment in the Biles case was in all respects similar to the judgment in this case, and the procedure was approved by the dissenting judges. In Hathaway *v.* Yakima Water, Light & Lower Company, 14 Wash. 469, the court enjoined the maintenance of a ditch across the land of the plaintiff, where the right of way had been taken and the ditch constructed without condemnation, but stayed proceedings for thirty days to allow condemnation proceedings to be instituted. This judgment was afterwards affirmed by this court, but the question of procedure was not discussed. In Kakeldey *v.* Colfax & P. S. Ry. Co. 80 Pac. 205, this court says: "An owner of land, who stands by and without protest sees a railroad constructed thereon, is estopped to thereafter maintain an action in ejectment or suit for injunction to prevent the operation of the road.
316 His remedy is limited to an action for damages for his compensation," citing Roberts *v.* N. P. R. Co., 158 U. S. 1; N. P. R. R. Co. *v.* Murray, 87 Fed. 648, and other cases fully sustaining

the rule there announced. On the other hand in New York *v.* Pine, 185 U. S. 93, the supreme court of the United States reversed a decree granting an unconditional injunction "With instructions to set aside its decree and to enter one providing for an ascertainment, in the way courts of equity are accustomed to proceed, of the damages, if any, which the plaintiffs will suffer by the construction of the dam and the appropriation of the water, and for which the defendant is legally responsible, a proposition upon which we express no opinion, and fixing a time within which the defendant will be required to pay such sum, and that upon the failure to make such payment an injunction will issue, as prayed for; and, on the other hand, that upon payment a decree will be entered in favor of the defendant. If the plaintiffs shall prefer to have their damages assessed by a jury, leave may be given to dismiss the bill without prejudice to an action at law." The authorities are divided on this question. If a judgment in ejectment at law, or decree of injunction in equity, would have the effect of stopping the operation of the railroad, or disabling it from discharging its duties to the public there would be strong and controlling reasons why such judgment or decree should not be awarded. But if proceedings are stayed as in this case, and the only effect of the judgment in ejectment is, to compel the railway company to make compensation for the property taken, we see no valid objection to such proceeding, on the ground of public policy or otherwise. While there has been apparent delay on the part of the respondent in the assertion of his rights, it must be remembered that the property was in litigation from 1887 until 1901 between the respondent and those under whom the appellants claim. If the value of the land has increased or conditions changed since the
317 right of way was taken, it is the misfortune of the appellants. This branch of the case involves no question of federal law. There is no error in the record and the judgment is affirmed.

RUDKIN, *J.*

We concur:

FULLERTON, *J.*
CROW, *J.*
ROOT, *J.*

318 In the Supreme Court of the State of Washington.

FRIDAY, *September* 15, 1905.

No. 5429.

JACOB SLAGHT, Respondent.

vs.

NORTHERN PACIFIC RAILWAY CO.; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING Co., a Corporation, Appellant.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Whitman county,

and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now, on this 15th day of September, A. D. 1905, on motion of Thomas Neill, Esquire, of counsel for respondent, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs, and that the said Jacob Slaght have and recover of and from the said Northern Pacific Railway Co., a corporation, John A. Miller and Anna Miller, his wife, and the Washington Grain and Milling Company, a corporation, and from the National Surety Company, surety, the sum of $23 & 20/100 Dollars, costs in the superior court, together with the costs of this action taxed and allowed at eighty-one & No/100 Dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance with the opinion herein filed.

319 STATE OF WASHINGTON:

In Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING COMPANY, a Corporation, Plaintiffs in Error,

vs.

JACOB SLAGHT, Defendant in Error.

Now come the Northern Pacific Railway Company, John a Miller and Anna Miller, his wife, and the Washington Grain & Milling Company, plaintiffs in error and pray that a writ of error in the above entitled cause may be issued from the supreme court of the United States to said supreme court of the state of Washington to review a certain judgment entered in said court on the 15th day of September, 1905, in favor of the said Jacob Slaght, defendant in error, and against the said Northern Pacific Railway Company, John A. Miller and Anna Miller, his wife, and the Washington Grain & Milling Company, plaintiffs in error, affirming a judgment entered in the superior court of the state of Washington in and for the county of Whitman, for the reason that manifest error hath intervened in the rendition of said judgment of said supreme court of the state of Washington to the great damage of the said plaintiffs in error; and the said Northern Pacific Railway Company, John A. Miller and Anna Miller, his wife, and the Washington Grain & Milling Company, plaintiffs in error, assign the following errors in the rendition of said judgment by the supreme court of Washington:

1. The court erred in affirming the judgment of the superior court of the state of Washington in and for the county of Whitman.

2. The court erred in holding and deciding that the defendant in error acquired any interest in or to the premises awarded to him by the judgment herein, paramount to the title and right of possession of the plaintiffs in error under the patent issued to the defendant in error by the United States.

3. The court erred in holding and deciding that the de-
320 fendant in error acquired any interest in the premises awarded to him by the judgment herein by virtue of his settlement and occupation prior to October 31, 1887.

4. The court erred in denying the title and right of possession of the plaintiffs in error to the premises awarded to the defendant in error by the judgment herein, founded upon the grant by the United States by the act of congress entitled "An act granting to railroads a right of way through the public lands of the United States," approved March 3, 1875, to the Spokane and Palouse Railway Company, the predecessor in interest of the plaintiff in error.

5. The court erred in denying the title and right of possession of the plaintiffs in error in and to the premises awarded to the defendant in error, founded upon an appropriation of said premises for railway purposes by the Spokane and Palouse Railway Company, the predecessor in interest of plaintiffs in error, while said premises were public land of the United States.

6. The court erred in holding that the premises awarded to the defendant in error by the judgment herein were not public lands of the United States when the same were appropriated by the Spokane and Palouse Railway Company, the predecessor in interest of the plaintiffs in error, within the meaning of the act of congress approved March 3, 1875, entitled "An act granting to railroads a right of way through the public lands of the United States."

7. The court erred in failing to hold that any possessory claim of the defendant in error, in and to the premises awarded to him by the judgment herein, was not extinguished, and all claims to damages therefor were not extinguished, by failure to appear and make claim therefor within six years after the opening of the Spokane and Palouse railway across said premises, within the meaning of said act of congress approved March 3, 1875.

8. The court erred in failing to hold that any cause of action existing in favor of the defendant in error was barred by the statute of limitations.

321 9. The court erred in holding that a possessory action could be maintained for the premises awarded to the defendant in error after the same had been appropriated, while public lands of the United States, for railway purposes.

NORTHERN PACIFIC RAILWAY COMPANY,
JOHN A. MILLER AND
ANNA MILLER, HIS WIFE, AND
THE WASHINGTON GRAIN & MILLING COMPANY,
By JAMES B. KERR,
JOHN M. BUNN, *Their Attorneys.*

Writ allowed:
WALLACE MOUNT,
Chief Justice and Presiding Justice of Supreme Court of Washington.

Indorsed: Petition for Writ of Error and Assignments of Error. Filed Sep. 15, 1905. C. S. Reinhart, Clerk.

322 STATE OF WASHINGTON:

In Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation; JOHN A. MILLER and ANNA MILLER, His Wife, and THE WASHINGTON GRAIN & MILLING COMPANY, a Corporation, Plaintiffs in Error.

vs.

JACOB SLAGHT, Defendant in Error.

The petition of the plaintiffs in error for the allowance of a writ of error from the supreme court of the United States in the above entitled cause having been duly presented and such writ of error having been heretofore allowed by Wallace Mount, chief justice and presiding justice of the supreme court of Washington, and application having been made for an order fixing the amount of the bond, which will operate as a supersedeas upon the suing out of the said writ of error, it is

Ordered that the plaintiffs in error file herein a bond in the sum of eight hundred dollars, conditioned that the plaintiffs in error shall prosecute said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, including just damages for delay, and upon the suing out of said writ of error and the filing of such bond duly approved the same shall operate as a supersedeas and shall stay all proceedings under the judgment of this court and the judgment of the superior court for Whitman county so affirmed by the judgment of this court.

WALLACE MOUNT,
Chief Justice and Presiding Justice of the Supreme Court of Washington.

Indorsed: Order fixing amount of Bond. Filed Sep. 27 1905. C. S. Reinhart, Clerk.

323 Know all men by these presents that we, the Northern Pacific Railway Company, John A. Miller and Anna Miller, his wife, and the Washington Grain & Milling Company, as principals, and The National Surety Company of New York, as surety, are held and firmly bound unto Jacob Slaght, his heirs, representatives, and assigns, in the full and just sum of Eight Hundred dollars to be paid to said Jacob Slaght, his heirs, representatives and assigns to which payment well and truly to be made we bind ourselves, our heirs, successors and representatives jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of September, in the year of our Lord nineteen hundred and five.

Whereas, lately in the supreme court of the state of Washington in a suit pending in said court between said Jacob Slaght, plaintiff, and the Northern Pacific Railway Company, John A. Miller and Anna Miller, his wife, and the Washington Grain & Milling Company, defendants, and the said defendants having obtained a writ

of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid cause, and the sum of eight hundred dollars having been duly fixed as the amount of security required herein, to operate as a supersedeas.

Now the condition of the above obligation is such that if the said Northern Pacific Railway Company, John A. Miller and Anna Miller, his wife, and the Washington Grain & Milling Company, shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, including all just damages for delay, then the above obligation to be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY, [SEAL.]
By JOHN M. BUNN,
Its Agent and Attorney.
JOHN A. MILLER, [SEAL.]
By JOHN M. BUNN,
His Agent and Attorney.
ANNA MILLER, [SEAL.]
By JOHN M. BUNN,
Her Agent and Attorney.
324 THE WASHINGTON GRAIN & MILLING COMPANY, [SEAL.]
By JOHN M. BUNN,
Its Agent and Attorney.
NATIONAL SURETY COMPANY, [SEAL.]
By E. C. MACDONALD, [SEAL.]
Its Att'y in Fact.

Sealed and delivered in presence of,

ALBERT ALLEN,
CHARLES GRANT.

The foregoing bond is approved as to form and sufficiency and it is ordered that the writ of error allowed herein upon the filing of this bond shall operate as a supersedeas and stay of all proceedings under the judgment of this court herein and the judgment of the superior court of Whitman county so affirmed by the judgment of this court.

WALLACE MOUNT,
Chief Justice and Presiding Justice of the Supreme Court of the State of Washington.

Indorsed: Bond. Filed Sep. 27 1905. C. S. Reinhart, Clerk.

324*a* Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I hereby certify and return that I served the annexed Writ of Error, on Thomas Neil, Certified by me to be such by handing to and leaving a true and correct copy thereof with him the said Thomas Neil, personally at Pullman, Wash. in said District on the Tenth day of October, A. D. 1905.

Service 2.00

GEO. H. BAKER,
U. S. Marshal,
By GEO. M. BAKER, *Deputy.*

324*b* UNITED STATES MARSHAL'S OFFICE,
EASTERN DISTRICT OF WASHINGTON.

I hereby certify and return, that I received the within writ on the 2nd day of October, 1905, and personally served the same on the 4th day of October, 1905, on Jacob Slaght by delivering to and leaving with Margaret A. Slaght an adult person, who is a member or resident in the family of said Jacob Slaght said defendant named therein, at Palouse City County of Whitman in said District, a full & correct copy thereof, at the dwelling house or usual place of abode of said Jacob Slaght one of said defendants herein.

Spokane October 6th, 1905.

GEO. H. BAKER,
U. S. Marshal,
By R. D. McCULLY, *Deputy.*

Fees Service of writ $2.00

325 United States of America to Jacob Slaght, Greeting:

You are hereby cited and admonished to be and appear at the supreme Court of the United States, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the state of Washington, wherein the Northern Pacific Railway Company, John A. Miller and Anna Miller, his wife, and The Washington Grain and Milling Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Wallace Mount, chief justice of the supreme court of the state of Washington, this 27th day of September in the year of our Lord one thousand nine hundred and five

WALLACE MOUNT,
Chief Justice of the Supreme Court of the State of Washington.

326 [Endorsed:] 5429 Filed Oct. 16 1905 C. S. Reinhart Clerk. Marshal's Docket No. 47

327 UNITED STATES OF AMERICA:

The President of the United States to the honorable supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said supreme court of the state of Washington, before you or some of you, being the highest court of law or equity of the said state in which a decision could be had, in a suit between Jacob Slaght, respondent, and Northern Pacific Railway Company, John A. Miller and Anna Miller, his wife, and The Washington Grain and Milling Company, appellants, wherein was drawn in question the validity of a statute or an authority exercised under the United States, and the decision was against its validity, manifest error hath intervened, to the great damage of the said Northern Pacific Railway Company, John A. Miller and Anna Miller, his wife, and The Washington Grain and Milling Company, as by their complaints appear, we, being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so that you may have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 16th day of September in the year of our
328 Lord one thousand nine hundred and five.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Western District of Washington,
By SAM'L D. BRIDGES,
Deputy Clerk.

The above writ is hereby allowed.

WALLACE MOUNT,
Chief Justice of Supreme Court of Washington.

329 [Endorsed:] No. 5429 In the Supreme Court of the State of Washington Jacob Slaght, Respondent, *vs.* Northern Pacific Railway Company et al., Appellants Writ of Error to the Supreme Court of United States Filed Sep. 23 1905 C. S. Reinhart Clerk.

330 In the Supreme Court of the State of Washington.

No. 5429.

NORTHERN PACIFIC RAILWAY COMPANY ET AL., Plaintiffs in Error,
v.
JACOB SLAGHT, Defendant in Error.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record of the above entitled cause as the same now remains on file in my office; and that, in accordance with the Writ of Error heretofore issued in said cause, I herewith transmit said transcript, together with the original Citation and the original Writ of Error, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Olympia this 14th day of November, 1905.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 19,997. Washington supreme court. Term No. 152. Northern Pacific Railway Company, John A. Miller and Anna Miller, his wife, and The Washington Grain & Milling Co., plaintiffs in error, *vs.* Jacob Slaght. Filed November 29th, 1905. File No. 19,997.

FILE COPY.

FILED
NOV 15 1
JAMES H. McKE

United States Supreme Court

OCTOBER TERM, 1908.

No. 152.

NORTHERN PACIFIC RAILWAY COMPANY, JOHN A. MILLER AND ANNA MILLER, HIS WIFE, AND THE WASHINGTON GRAIN AND MILLING COMPANY,
Plaintiffs in Error,

vs.

JACOB SEAGHT,

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES W. BUNN,
JAMES B. KERR,

NORTHERN PACIFIC RAILWAY COMPANY, JOHN A. MILLER AND ANNA MILLER, HIS WIFE, AND THE WASHINGTON GRAIN AND MILLING COMPANY,
Plaintiffs in Error,

vs.

JACOB SLAGHT.

STATEMENT.

This controversy involves the title to a right of way at the town of Palouse, State of Washington, which the plaintiff in error Railway Company claims to own and of which it and its predecessor have been during about twenty years in possession. The Railway Company's title is asserted under the act of Congress of March 3, 1875, granting right of way to railways through the public lands, and rests upon location and construction under that act by the Spokane and Palouse Railway Company, which conveyed to the plaintiff in error. The state court of Washington decided against the right so asserted and this writ was sued out. The opinion of the supreme court of Washington will be found p. 203 Transcript.

No. 153 of this calendar, *Northern Pacific Railway Company et al., Plaintiffs in Error, v. Margaret A. Slaght,* involves identical questions with this case and the two will herein be treated together. The plaintiffs in error in each case, other

than the Railway Company, are its lessees, operating upon the right of way warehouses and other structures connected with the public service of the railway.

The facts are correctly stated in the opinion of the supreme court of Washington, and with one or two exceptions are correctly stated in the findings of the trial court (Transcript, pp. 85-98).

During the year 1886 and the first half of 1887 the Spokane and Palouse Railway Company, a corporation under the laws of the Territory of Washington, which we will for brevity call the Spokane Company, constructed and completed at great expense its railroad upon the premises in dispute; and ever since the railroad has been operated daily, carrying freight, passengers and the mail (Transcript, pp. 93, 203). The Spokane Company sold all its property to the Northern Pacific February 21, 1899, and both companies have claimed at all times a right of way two hundred feet wide under the act of Congress of March 3, 1875. The Spokane Company upon April 26, 1886, complied with the act of 1875 by filing its articles and proofs of its organization and afterward in due time filed its map or profile, and its proofs were duly approved as the act of Congress requires (Transcript, p. 94).

There have been constructed upon the right of way by the Railway Company valuable and lasting improvements, tracks, bridges, water tank and warehouses (Transcript, p. 96). It would be *possible* for the Railway Company to operate upon

a right of way twenty-five feet wide with a space one hundred feet wide for station (Transcript, p. 97), but for the *proper* transaction of its business a two hundred foot right of way is necessary (Transcript, p. 204). The judgment of the state court awards to the Railway Company a right of way 25 feet wide and station grounds 100 feet wide, and denies its right to more.

When the railway was surveyed and built, Jacob Slaght and his wife, Margaret A. (the defendant in error in No. 153) resided upon the lands and saw the railway built by the expenditure of large sums of money (Transcript, p. 204). About the time the railroad surveyors entered upon the lands Slaght published a notice in a newspaper warning all persons not to trespass upon his homestead, which, although his house was fifteen feet from the railway, was the only notice or protest he made until this suit was brought in 1903 (Transcript, p. 96).

The defendant in error and Margaret A. Slaght were husband and wife; in 1883 they settled upon government lots 10, 11, 14 and 15 in section 1, containing the right of way in question, with intent to make a homestead, and have always since lived there (Transcript, p. 86). October 31, 1887, they presented to the land office an application for homestead entry (Transcript, p. 87). But this was after the railway was completed, so that when the railway was built there was no *entry* against the lands.

In our view the foregoing are all the material

facts. But to support an assertion, that this controversy has been once adjudicated, the defendant in error showed and it was found; that the Northern Pacific Company once claimed to own the whole of this section 1 under its land grant; that so claiming it contested Slaght's entry and was defeated in the land department (Transcript, pp. 87-93); that patent was issued to Slaght (Transcript, p. 93) and the Railway Company conveyed the section to one Powers, who made a deed of the right of way to the Spokane Company (Transcript, p. 94); that in 1897, suit was brought by Powers and the Spokane Company against Slaght to have him declared a trustee for plaintiffs of the legal title to said lots 10, 11, 14 and 15 (Transcript, p. 94); that this suit was disposed of upon demurrer to the complaint (Transcript, p. 95) resulting in the final defeat of the plaintiffs in this court; *Powers v. Slaght*, 180 U. S. 173. The question of title of the right of way under the act of 1875 was not pleaded or litigated in the former suit.

ASSIGNMENTS OF ERROR.

1. The court erred in holding that the Railway Company had no right of way under the act of Congress of March 3, 1875.

2. The court erred in holding that the statute of limitations of Washington could not, because the laws of the United States forbade, commence to run until patent issued.

ARGUMENT.

(A) Section 1 of the act of Congress of March 3, 1875, provides:

> "That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road."

Section 3 is as follows:

> "That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-four."

The Spokane Company in 1886 filed proof of its incorporation as required by the act, and in 1886 and 1887 built its railway while the lands were public lands of the United States free from any claim of record. While the defendant in error had lived on the lands since 1883, he had never en-

tered or attempted to enter them as a homestead, though they were surveyed and were subject to entry. *Hewitt v. Schultz,* 180 U. S. 139. The supreme court of Washington held that the act of 1875 did not operate upon this land (it being subject to a possessory claim) *until* that claim was condemned or acquired (Transcript, pp. 206-207), while we think it clear that the act attached as a grant *in praesenti,* conveying a good title when the road was completed, in so far as the United States had a title to convey and *subject* to the possessory right. It is submitted that this is the necessary result of the decisions in *Noble v. Union River Logging Co.,* 147 U. S. 165, 172, and *Jamestown and Northern R. R. Co. v. Jones,* 177 U. S. 125. In the latter case the land was, when the road was located and built, subject to pre-emption claims of record; and the court held that the grant was one *in praesenti,* consummate upon the construction of the road (though no map was filed) and that it took effect upon the land *subject to* the pre-emption claims. This doctrine is wholly different from that prevailing as to ordinary congressional land grants. As said by the court in *Railroad Company v. Baldwin,* 103 U. S. 426:

> "The language of the act here, and of nearly all the congressional acts granting lands, is in terms of a grant *in praesenti.* The act is a present grant, except so far as its immediate operation is affected by the limitations mentioned. 'There is hereby granted' are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed the title attaches from the

date of the act to the sections, except such as are taken from its operation by the clauses mentioned. * * *

"But the grant of the right of way by the sixth section contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms.

"Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby. * * * For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route. * * *

"We see no reason, therefore, for not giving to the words of present grant with respect to the right of way the same construction which we should be compelled to give, according to our repeated decisions, to the grant of lands had no limitation been expressed. We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road."

If, as held in *Jamestown and Northern v. Jones*, the right of way grant made by the act of 1875 takes effect *immediately* upon lands subject to preemption claims, it cannot but follow that it similarly takes effect upon land subject to "possessory rights." And this conclusion conforms to the language of the act, which says: "That the right of

way through the public lands of the United States *is hereby granted"*; and "That the legislature of the proper Territory may provide for the manner in which private lands and *possessory claims* on the public lands of the United States may be condemned." See *Washington and Idaho Railroad v. Osborn,* 160 U. S. 103, and *Spokane Falls and Northern Railway Co. v. Ziegler,* 167 U. S. 65.

That public lands subject to *possessory claims* are subject to the disposal of Congress is well settled. *Northern Pacific Railroad Co. v. Colburn,* 164 U. S. 383 and cases cited. *Simmons v. Ogle,* 105 U. S. 271; *Water and Mining Co. v. Bugbey,* 96 U. S. 165; *Lansdale v. Daniels,* 100 U. S. 113.

The issuing of a patent to Slaght without reservation or exception of the right of way does not operate to free the land from that right. As said by the Secretary of the Interior in 20 Land Decisions, 133, with respect to the necessity for inserting in patents a reservation of rights of way:

> "Under the act of March 3, 1875 (*supra*), such protection does not appear to be necessary. The act itself affords ample protection to the company if it has any rights which the courts may hereafter determine have not been forfeited. The language of section four of said act is, 'and thereafter all such lands over which such right of way shall pass, shall be disposed of, subject to such right of way.' These lands are then disposed of, subject to such right of way, by virtue of the statute.
>
> "This is not a direction to the land department to insert limitations and restrictions in the final certificate and patent, but a legislative declaration of the reservation of a right of way to such railroad companies as may

> have complied with the law. The insertion of the right of way clause would answer no purpose except to embarrass the settler, and leaving it out does not affect the rights of any railroad company under said act."

(B) If we are correct thus far, it is obvious that the error pointed out of the court below is the basis of its opinion. The learned court (Transcript, p. 207) approves its previous decision in *Kakeldy v. Columbia and P. S. Ry.*, 37 Wash. 675, saying:

> "An owner of land, who stands by and without protest sees a railroad constructed thereon, is estopped to thereafter maintain an action in ejectment or suit for injunction to prevent the operation of the road. *His remedy is limited to an action for damages for his compensation.*"

The same doctrine was held in *Roberts v. Northern Pacific Railroad Co.*, 158 U. S. 1, and *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 260.

The court below professed to adhere to the rule last stated. The point of its decision was that *no* statute of limitation of the state of Washington *could* commence to run before patent issued, *for the reason* that until then title was in the United States, *the act of* 1875 *not passing title to the railway company because of the possessory claim.* It will be seen that the proposition controlling the learned court's opinion was that *title to the right of way was in the United States until the patent issued to Slaght, and by that instrument passed to him;* or in other words that the act of 1875 did not

operate upon the title until the possessory claim was condemned.

The Washington statute of limitations for the recovery of land is ten years and the statute for the recovery of damages a shorter period.

But the court held that its own statute of limitation could not apply because this court had so held in *Gibson v. Chouteau,* 13 Wall. 92, and *Redfield v. Parks,* 132 U. S. 239. And this certainly cannot be the law if the title vested in the Railway Company by the act of 1875, *subject to the possessory claim.* The doctrine of the two decisions of this court relied upon extends only to actions *dealing with the title itself* before it has passed from the United States.

It is entirely clear that one occupying public land may protect his *possessory right* before patent. It is clear upon the decisions of this court that he would be protected by injunction or by any other proper remedy against a railway claiming under the act of 1875; *Washington and Idaho R. R. Co. v. Osborn,* 160 U. S. 103; *Spokane Falls & Northern Ry. Co. v. Ziegler,* 167 U. S. 65; and other courts have held that he will be protected by any appropriate action; *Brown v. Hartshorn,* 12 Okla. 121; *Woodruff v. Wallace,* 3 Okla. 355, and cases cited; *French v. Cresswell,* 13 Oregon, 418; *Burlington, etc., R. R. Co. v. Johnson,* 38 Kan. 142; *Wendel v. Spokane County,* 27 Wash. 121. See also *Pierce v. Frace,* 2 Wash. 81.

If the right of the defendant in error is only to recover damages, then the ruling of the state court,

that the statute of limitation could not run until patent, is clearly erroneous. Regardless of whether this action is one for damages or one to recover possession, the ruling is erroneous if the title vested in the railway company subject to the possessory claim. For if the title vested in the railway company under the act of 1875 as we contend, defendant in error could not maintain ejectment *either before patent or after,* while he could by several actions and suits, either in the state or federal court, protect his possessory claim, recover damages for its violation, or enjoin the railway from intruding upon it.

The injustice of the defendant in error's position so impressed the court below that it awarded to the railway company twenty-five feet of right of way and a depot site one hundred feet wide. Why this result it is impossible to say, for if the court below is right, the railway had as little right to that part of the land it occupied as to the balance. Other questions might be suggested, but perhaps not federal. The question of the interpretation of the act of 1875 is a federal question and the controlling and only question in the case.

(C) The decision in *Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co.,* 142 U. S. 396, 410, seems to settle that the former litigation terminating in *Powers v. Slaght* is not *res adjudicata.* See also *Gilman v. Rives,* 10 Peters, 298; *Freeman on Judgments* (4th ed.), sec. 267; *Van Fleet Former Adjudication,* sec. 306 and following.

These authorities settle that where the judgment

in the former action is upon demurrer to a complaint, the estoppel extends only to the very point raised in the pleading and does not bar another action based upon other facts. In the case at bar the findings (Transcript, pp. 94-5) show that the complaint in the former suit pleaded a special title alleged to be in fee simple absolute to the whole section, viz: a title by selection as indemnity under the grant made by Congress to the Northern Pacific Railroad by the act of July 2, 1864. The judgment was upon demurrer to the complaint and its effect was *only to decide against the title specially set forth in that pleading.* In this action the right asserted is a perpetual easement or way by virtue of the act of 1875 through the lands involved in the former suit. Not only was this right not pleaded in the former complaint, but under it the title now asserted could not have been proved.

CHARLES W. BUNN,
JAMES B. KERR.

FILE COPY.

FILED.
DEC 13 190
JAMES H. McKEN

United States Supreme Court

OCTOBER TERM, 1906.

No. 152.

NORTHERN PACIFIC RAILWAY COMPANY, JOHN A. MILLER AND ANNA MILLER, HIS WIFE, AND THE WASHINGTON GRAIN AND MILLING COMPANY,

Plaintiffs in Error,

vs.

JACOB SLAGHT.

BRIEF FOR DEFENDANT IN ERROR.

U. L. ETTINGER,
COUNSEL.

THOMAS NEILL,
W. E. McCROSKEY,
ATTORNEYS.

NORTHERN PACIFIC RAILWAY COMPANY, JOHN A. MILLER AND ANNA MILLER, HIS WIFE, AND THE WASHINGTON GRAIN AND MILLING COMPANY,

Plaintiffs in Error,

vs.

JACOB SLAGHT.

STATEMENT OF CASE.

The facts material to this review may be summarized as follows:

About March 1st, 1883, the defendant in error, and Margaret A. Slaght, his wife, settled upon government lots 10, 11, 14 and 15, section one, over and across which the right of way involved in this case is located, and established their residence thereon with the view of entering the same under the homestead laws of the United States, and continued to reside thereon until after a patent was issued to them for said land. (Transcript, page 127.)

On the 31st day of October, 1887, defendant in error made application to the local land office to file a homestead entry on said land, alleging settlement thereon from March 4th, 1883. (Transcript, page 127.) He could not make a filing before that time because of the fact that the Secretary of the Interior had withdrawn the land from settlement, and had in-

structed the local land officers not to accept filings. (See 2 Land decisions, page 517).

When the filing was tendered, the Northern Pacific R. R. Co. was notified and it contested Slaght's right to file on this land, claiming that it belonged to it, under the grant of 1862, and their selection in 1883. The local land officers decided that the land was not subject to the railroad's selection, but that Slaght was not entitled to it as he was only a tenant of one Powers. (Transcript, 128.)

The Railroad company appealed from that part of the decision adverse to it and Slaght appealed from the decision holding him to be a tenant of Powers, and the Hon. Commissioner decided that the selection by the railroad company was improper and that the company had no right to the land prior to selection, and that when the selection was made that Slaght had settled on the alnd in good faith with the view of taking the land under the homestead laws, and that he was a qualified settler and had continuously resided on the land since March 1st, 1883, and directed that in case his decision should become final that Slaght be permitted to file on the land. (Transcript 37, 128.)

The railroad company appealed to the Secretary of the Interior who affirmed the decision of the Hon. Commissioner, and on April 20, 1897, a patent was issued to defendant in error. (Transcript, page 130-131.)

The Spokane and Palouse R. R. Co. constructed

its road over and across this land in 1886 and fore part of 1887, and filed with the Secretary of the Interior its articles of incorporation and profile which was approved June 27, 1888. (Trans. page 169.)

In August, 1887, the Northern Pacific R. R. Co. sold and conveyed said government lots to one William L. Powers, and on the 14th day of September, 1887, said Powers conveyed to the Spokane and Palouse Ry. Co. a strip across said government lots, two hundred feet wide, for a right of way, which is the same land in controversy in this case. (Trans. page 132.)

On May 12, 1897, the Spokane and Palouse Ry. Co., William L. Powers et al. commenced an action in the Superior Court of the State of Washington, against defendant in error and his wife, to cancel the patent that had been issued to them and to compel a conveyance from them to plaintiffs, alleging that they were the owners in fee of the land through measne conveyance from the Northern Pacific R. R. Co. (Trans. page 133.)

The complaint in that action is set out in full in the reply in this case, and is found in the transcript on pages 29 to 41 inclusive.

Said complaint was verified by an officer of the Spokane and Palouse Ry. Co. and therein it was alleged, in paragraph XI thereof that the Spokane and Palouse Ry. Co. "asserts and claims title to certain portions of the land under and by virtue of certain

instruments in writing duly made and delivered to it by William L. Powers."

A demurrer to that complaint was sustained and the case dismissed and the plaintiffs appealed to the Supreme Court of the State, and from the judgment of said Supreme Court affirming the judgment of the lower court, a writ of error was taken to this court, and on February 23, 1901, this court affirmed the judgment of the state court. (Trans. 133) and in May, 1902, this action was commenced.

(The individuals named as plaintiffs in error are tenants of Northern Pacific Railway Co. and hence we refer to the plaintiffs in error as if the Company was the sole plaintiff in error.)

POINTS AND AUTHORITIES.

The act of March 3, 1875, does not grant to a railroad company a right of way over lands occupied by a settler, without condemnation proceedings.

Railroad Co. vs. Osborn, 160 U.S. 103.
Spokane Falls and N. R. Co. vs. Ziegler, 167 U.S. 69.

The act was in the nature of an offer to any railroad Co. to take effect when accepted.

Railroad Co. vs. Sture, 32 Minn. 95.
Denver & RG. R. Co. vs. Wilson, 62 Pac. Rept. (Col.) 843.

The title under a patent relates back to the date of settlement.

Sec. 4, act of 1880, Supl. Rev. Stat. U.S. 282.
Maddox vs. Burham, 156 U.S. 544.
Nelson vs. N. P. R. Co., 188 U.S. 108.

As against a subsequent claimant on public lands the first in time is the first in right.

Shepley vs. Cowan 91 U.S. 330.
Ard vs. Brandon 156 U.S. 537.

A settler on public lands, before he has made a filing thereon is protected by the act of Congress of 1880.

Nelson vs. N. P. R. R. Co., 188 U.S. 108.

The court will take judicial notice of the rules and orders of the Land Department.

Caha vs. U.S. 152 U.S. 211.
Knight vs. U.S. Land Asst. 142 U.S. 161.

The order of withdrawal of this land, the instructions to local land officers not to accept filings thereon and the order restoring the land to settlement are found in the land decisions.

2 Land Dec. 517.
6 Land Dec. 85 and 131.

The judgment in a former action in which the title to this land was determined is res adjudicata of this case.

24 Ency. of Law (New Ed.) 781 and cases cited.
New Orleans vs. Citizens Bank 167 U.S. 396.
State Exp. vs. Tacoma 13 Wash. 141.
Insensle vs. Auttin 15 Wash. 352.

A judgment on a demurrer to the merits is as much an adjudication as if rendered after trial of facts.

Ally vs. Nott 111 U.S. 472.
Could vs. Railroad Co. 91 U.S. 526.
VanFleet Former Adj. Sec. 306.
24 Ency. Law, (New Ed.) 798.

ARGUMENT.

The questions before this court are:

1. Has the plaintiff in error any right or claim to the right of way in controversy under and by virtue of the Act of Congress of March 3, 1875?

2. If the Spokane and Palouse Ry. Co. the grantor of the plaintiff in error, ever had a right to claim title under the act of 1875, did it lose that right, through an adjudication of title in the case of Powers et al, vs Slaght, wherein the title to this land was determined to be in defendant in error?

The only cases in this Court that we are aware of, where the act of March 3, 1875 was construed as it effected the right of a settler, are the cases of Railroad Co. vs. Osborn 160 U.S. page 103 and Spokane Falls and N. Co. vs. Ziegler 167 U.S. 69.

The only difference between the Osborn case and the one at bar is that Osborn was a settler on unsurveyed land, while the defendant in error was a settler on surveyed land.

Osborn admitted the right of Congress to grant the land, notwithstanding his settlement, but insisted that the act of March 3, 1875, did not grant it to the railroad company, but on the contrary had preserved the rights of settlers by the 3rd section of the act.

This court after quoting the position of Osborn said:

> "It must be conceded that Osborn did not by maintaining possession for several years and putting valuable improvements thereon, preclude the government from dealing with the land as its own and from conferring them on another party by a subsequent grant. On the other hand it would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give to them the right to run the lines of their road at pleasure, regardless of the rights of settlers. Accordingly when we examine the act of March 3rd, 1875, upon which plaintiff rests its claim of right to appropriate to its use, without compensation, the land and improvements of Osborn, we find in the 3rd section an express provision saving the rights of settlers in possession."

In the Ziegler case, a filing had been made, but the railroad company made the claim, that is made in the case at bar, viz. "That Ziegler as a mere settler upon public lands of the United States, although with the intention to obtian title to the same, under the pre-emption laws, did not have such vested interest, in the land as would avail against the railroad company, in asserting its right of way conferred by the act of Congress," but this court said:

> "An answer to this question is furnished by the case of Washington & I. R. Co. vs. Osborn 160 U.S. 103 where it was held that a railroad company, whose railroad is laid out so as, under the provisions of the act of March 3, 1875, to cross a part of the public lands, cannot take the part thereof in the actual possession and occupation of a settler who is entitled to claim a pre-

> emption right thereto when the proper time comes, and who has made improvements on the land so occupied by him, without making proper compensation therefor."

This act of 1875 is not a grant *in praesenti* in the same sense as was the grant contained in the act construed in the case of Railroad vs. Baldwin 103 U. S. 426, where the act designated the grantee and contained no conditions, but as said by the Supreme court of Minnesotta in Railroad Co. vs. Sture 32 Minn 95. "This act is in the nature of a general offer to the public, which takes effect and becomes operative as a grant to a particular company only when it accepts its terms by compliance with the conditions precedent in the act itself. This is clearly the theory on which the act is founded. It merely offers or proposes to give any railroad company upon compliance with its terms, the right of way over public lands, to which private rights have not been attached at or before the date of such compliance."

Denver & RG. R. Co. vs. Wilson 62 Pac. 843.

The rights of a railroad company cannot attach until it has manifested its acceptance by complying with the terms of the act or perhaps by the construction of its road. Until then the land is open for settlement, and if settled upon before the company has manifested its acceptance, the settlers' rights must be superior and paramount to that of the company, and under the doctrine of relation, when the settler receives patent, his title relates back to the date of settlement.

See Sec. 4 of act of 1880 Sup. Revised Stat. U. S. page 282.
Maddox vs. Burham 156 U.S. 544.
Nelson vs. N. P. R. R. Co. 188 U.S. 108.

If it were otherwise than this, then a railroad company could claim a right of way over land which had been patented before it accepted the grant under the act of 1875. Under the theory of the plaintiff in error as we understand it, viz: that the grant was *in praesenti* and that the title of the Government was conveyed by the act and remained a floating title until accepted by a company, it must logically follow that if the title passed from the government by the act of 1875 then a subsequent patent to the land would not convey title to a right of way that might be afterwards claimed by a railroad company.

This we submit is a fair deduction from the position taken by the plaintiff in error and shows, we think the absurdity of their position.

The rights of settlers on public lands before they made a filing thereon, was always protected against a subsequent settler, on the doctrine that "the first in time is the first in right."

Shepley vs. Cowan 96 U.S. 330.
Ard vs. Brandon 156 U.S. 537.

But by the act of May 14, 1880, entitled "An act for the relief of settlers on public lands." (Supt. to Revised Stat. 282) the rights of settlers on surveyed and unsurveyed lands prior to filing were confirmed and recognized by Congress.

This court in the case of Nelson vs. N. P. R. R. Co. 188 U.S. 108 said:

> "The third section of this statute is a distinct confirmation of a qualified person who had heretofore settled or should hereafter settle on *any* of the public lands of the United States whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws." * * * "Some who have made comments on this section seem to have overlooked the broad language of section 3 and to forget that that secon embraces not only those who had theretofore but those who might *thereafter* settle on the public lands whether surveyed or unsurveyed." * * * "The meaning we have given to the words, occupied by homestead settler in the act of 1864, and what has been said about the act of 1880, finds support in the decisions of the land department."

In the State Courts the plaintiff in error sought to avoid the effect of this decision by saying that in that case Nelson could not file on the land because it was not surveyed, but that under the act of 1880 where the land was surveyed, the settler had to make his filing within three months, from the time of settlement, and failing to do so he lost his rights as against another, and as this land was surveyed, and Slaght had settled on it in March, 1883, but not having filed on it until October, 1887, he can claim nothing by virtue of his settlement as against the plaintiff in error.

The fact is, however, that Slaght could not file on this land before the middle of October, 1897, and

that he filed on it within fifteen or twenty days after the government gave him the privilege of doing so. That this is true will be seen from an examination of the orders of the Hon. Secretary of the Interior of which this court will take judicial knowledge.

Caha vs. U.S. 152 U.S. 211.
Knight vs. U.S. and Asst. 142 U.S. 161.

When Slaght settled on this land it had been withdrawn from settlement as indemnity land. (Transcript page 36.)

On May 22, 1883, which was about six months before Slaght settled on this land, the Hon. Commissioner of Public lands issued an order to registers and receivers of local land offices within the indemnity belt directing them to refuse applications for land withdrawn for indemnity purposes. (See 2 Land Decisions page 517.)

On August 3, 1887, the Hon. Secretary of the Interior revoked the order of withdrawal of this land, and on September 6, 1887, the Hon. Commissioner issued a circular to registers and receivers to carry out the order of withdrawal, but not to accept filings until after notice of restoration had been published for thirty days.

(See 6 Land decisions pages 85 and 131.)

This circular was dated September 6, and must have required at least five days to reach the local land offices and hence it must have been at least the middle of October before the land was open for fil-

ings, and Slaght made his filings on October 31, 1887.

Hence as said by this court in the Nelson case, supra, "*He could not initiate his right by formal entry of record until the local officers would accept it. He acted with as much promptness as was possible under the circumstances.*"

We now turn to the cases cited by plaintiff in error to see if there is anything therein which is against what the court has said in the cases cited by us.

In support of its claim that the act of 1875 gave it a title, and that Slaght's rights were subject to that title the cases of Noble vs. Union River Logging Co. 147 U.S. 165 and Jamestown & Northern R. Co. vs. Jones 177 U.S. 125, are cited.

In the Noble case the question before the court was the right of the Secretary of the Interior to set aside the act of his predecessor in office. The former secretary had approved the article of incorporation and map of route filed by the Logging Co. under the act of 1875, and Secretary Noble having learned that the Logging Co. was not such a railroad as contemplated by the act, issued a notice to the company to show why the approval of the former secretary should not be revoked and annulled. The question before the court was one of jurisdiction only, and the court said that the functions of the Land Deparmtent ceased when title passed from the government and as the land was public lands, that

the order approving the plat passed the title, and that the department had no further power over it.

It is true that the court stated that the act of 1875 was a grant *in praesenti*, which was true under the facts in that case, as the land was unoccupied, but the rights of a settler was in no way involved in that case. Again said statement was not necessary to a decision of the case and was therefore dictum.

In the Jamestown Northern vs. Jones case, one Sherman Jones filed a pre-emption declaratory statement on February 12, 1881, alleging settlement on February 8, 1881. On May 26, 1882, one King filed his declaratory statement. On February 23, 1883, T. J. Jones settled on the land and filed his declaratory statement, and about the same time Ella Sharp filed a homestead entry thereon. Afterwards T. J. Jones attempted to make final proof under his pre-emption filing, but was refused because of the uncancelled homestead entry of Ella Sharp. Afterward T. J. Jones secured the relinquishment of Sharp's rights, and then filed on the land as a homestead and made final proof. The railroad was constructed *before T. J. Jones ever went on the land*, and the Court held that the construction of the road was evidence and notice of the appropriation, and as Jones had settled on the land, *after the road had been constructed*, his entry was subject to the right of way.

The question before the Court was the right of T. J. Jones in the land, who entered it after the road had been built, as against the railroad. Jones did not

claim any rights as successor in interest to any of the prior settlers, and as the Act of 1875 gave the company a right of way over public lands except as against settlers having possessory rights, when these possessory rights, from any cause, ceased to exist then the land, became free public land, and the right of way attached without conditions.

We can see no parallel in that case to the one at bar. The first claimants having abandoned their claims, then the land became free public land, over which the government had granted a right of way to any railroad which complied with the requirements of the law, and hence any subsequent settler took it subject to this right. In the case at bar respondent continued his residence and cultivation, and by reason thereof secured title, so that the company never secured any rights therein as against him and could only have done so through agreement or condemnation proceedings.

Even if there had been no saving clause in the act of 1875 we submit that the plaintiff in error could not claim any rights to this land because the Spokane and Palouse R. Co. did not *accept* the grant until after the patent had issued to Slaght.

This must be true, because up until February, 1901, when this court decided otherwise, the Spokane and Palouse R. Co. claimed that this land had been granted to the Northern Pacific R. R. Co. under the

grant of 1862, and that it was not public lands in which Slaght could secure any title whatever.

This claim is absolutely inconsistent with the claim that the act of 1875 gave said company a right of way, because if the land had been granted to the N. P. R. R. Co. then it was not public lands and the act of 1875 did not in any way effect it.

Now a grant must have a grantee capable of taking it and who is willing to *accept it*, and while the filing of the articles of incorporation and plat of route is one evidence of an acceptance, yet it is not evidence that the company has accepted the benefits of the act as applied to any particular land, if the conduct and acts of the company show that in fact it did not accept it as to such land. Now it is evident that the Spokane and Palouse railroad did not claim any right under the act of 1875 in September, 1887, when it took a deed from Powers as the grantee of the N. P. R. R. Co. nor had it accepted the grant in May, 1897, when it verified the complaint in the case of Powers vs. Slaght, wherein it alleged that it claimed title under and by virtue of a deed from Powers, and that was after the patent had issued to Slaght.

The fact is that this claim of right under the act of 1875 is an afterthought, brought forward to defeat the rights of defendant in error which he secured after years of litigation in the Land Department and in the State and Federal courts.

ESTOPPEL BY JUDGMENT.

We claim that the plaintiff in error is estopped by the judgment of the state courts and this court in the case of Powers et al vs. Slaght 180 U.S. 173, from claiming a right to this land through any source other than a conveyance from defendant in error or his wife.

The question involved in that case was the ownership of all of government lots 10, 11, 14 and 15, section one over which this right of way is located, and the source of title was only a matter of evidence. The question involved in the case at bar is the ownership of part of said government lots. The plaintiff in error is the grantor of one of the parties to that action and the transfer was made after the adjudication. That judgment adjudicated not only the rights of the parties under the facts set out in the complaint, but also all claims that could have been raised or pleaded in said action.

24 Ency. of Law (New Ed.) page 781 and cases cited.
Isensle vs. Austin, 15 Wash. 352.
State vs. Tacoma, 13 Wash. 141.

The Spokane and Palouse R. Co. was not required to go into that case in order to protect its rights, if the claim of the plaintiff in error in this case is cor-

rect, but having become a party to that action it is bound by the adjudication, and cannot now say that notwithstanding that judgment declaring Slaght to be the owner in fee of all this land, yet it is owner of the fee of part of it.

In considering the question of a former adjudication the question is what was the thing determined in the former action?

New Orleans vs. Citizens Bank 167 U.S. at page 396 and cases there cited.

A decision on a demurrer which goes to the merits has the same force as a judgment after trial.

Ally vs. Nott 111 U.S. 472.
Could vs. Railroad Co. 91 U.S. 526.
VanFleet former Adj. Sec. 306.
24 Ency. of Law (New Ed.) 798.

Before closing we desire to call the attention of the court to the fact that by the judgment of the State court, the plaintiff in error, the N. P. R. R. Co., is given the same right that the act of 1875 gave its grantor, to-wit: the right to bring proceedings to condemn the right of way if it desires to do so, and gives to it the right to occupy 25 feet of right of way where its track, bridges etc. are located without condemnation, so that it has not lost anything nor has it been put to any inconvenience or hardship by the judgment.

We confidently submit that the decision of the State Supreme Court was in keeping with the decisions of this court, and that even if it did err in

those matters specifically passed upon, yet the judgment is correct because the title of the defendant in error was determined in his favor by former adjudications between defendant in error and the grantor of the plaintiff in error.

Respectfully submitted,

U. L. Ettinger,

Counsel for plaintiff in error.

Thomas Neill and W. E. McCroskey, Attorneys.

Supreme Court of the United States.

No. 152.—October Term, 1906.

Northern Pacific Railway Company, John A. Miller and Anna Miller, his wife, and The Washington Grain and Milling Company, Plaintiffs in Error, *vs.* Jacob Slaght.	In error to the Supreme Court of the State of Washington.

[March 11, 1907.]

Mr. Justice McKenna delivered the opinion of the Court.

This is an action of ejectment brought by defendant in error against plaintiffs in error in the Superior Court in and for the county of Whitman, State of Washington, for land situate in the town of Palouse.

The trial court adjudged defendant in error the owner in fee simple of the land sued for, and that the plaintiffs in error were in the possession and occupation of the portions thereof described in their answers against the will and consent of the plaintiff (defendant in error), and were occupying and in possession thereof without right, except that the Northern Pacific Railway Company, as a public carrier, had a right to hold the possession of a strip of land twenty-five feet wide, "being twelve and one-half feet on each side of the center line between the rails of its main track over and across said land, and also a tract 100 feet square." This tract was described. Defendant in error was adjudged entitled to recover "all the rest of the land described in the amended complaint." And that a writ issue to put him in possession thereof, but not until ninety days from the date of the judgment, and if an appeal should be taken and proceedings stayed then not until ninety days from the time the remittitur from the Supreme Court affirming the judgment should be filed; and if, in the mean time, the railway company should commence proceedings in the proper court to condemn the land claimed by it and described in its answer, for railroad purposes, then said writ should not be issued as to such land it might seek to condemn, unless the company should afterwards dismiss such proceedings or fail to prosecute the same to final judgment and pay the award that might be made therein. The Supreme Court affirmed the judgment. 39 Wash. 576.

The facts, as far as necessary to be stated, are that after proceedings in the land office, to which the railway company was a party, a homestead

patent was issued to defendant in error April 20, 1897, to lots 10, 11, 14 and 15 of section 1, township 16 N., range 45 E, Willamette meridian. Defendant in error established his residence upon the land in 1883.

In 1886 and the first half of 1887 the Spokane and Palouse Railway Company constructed and completed, at great expense, a railroad over lots 10 and 11, conforming to the survey previously made and staked out, and from and after its completion it was operated daily and continuously in the carrying of freight, passengers and mail. The right of way claimed was one hundred feet wide on either side of the main line of railroad. It would be possible for plaintiff in error, who is the successor of the Spokane company, to carry freight, passengers and mail over a right of way not exceeding twenty-five feet in width, and a space of one hundred feet square would permit of the erection of a depot at the town of Palouse. But great inconvenience would result to the citizens of that town and vicinity and the railway company. For the convenient, prompt and expeditious handling of freight and the erection of elevators for storing grain and wheat a right of way of two hundred feet is necessary. At the time the railroad was surveyed and constructed defendant in error resided upon said lands and knew of its construction and the expenditure of large sums of money therefor. About the time of the survey he published a notice in the Palouse News, a newspaper published in the vicinity of the land, forbidding all persons from trespassing thereon. This is the only objection he made. In the month of August, 1887, the Northern Pacific Railroad Company, claiming to be the owner of lots 10 and 11, conveyed the same to William S. Powers, and he, on the 14th of September of the same year, conveyed to the Spokane and Palouse Railway Company a right of way two hundred feet wide over lots 10 and 11, being the same then claimed by that company and now claimed by plaintiff in error, the Northern Pacific Railroad Company. On the 12th of May, 1897, the Spokane and Palouse Railway Company, Powers and others, as successors in interest of Powers under the above deed of conveyance from the Northern Pacific Railroad Company, brought a suit against the defendant in error, which will hereafter be referred to and described. The complaint was amended. The date of its filing as amended does not appear. It was sworn to February 19, 1898. A demurrer to the amended complaint was sustained and, the plaintiffs declining to plead further, a judgment was entered June 24, 1898, dismissing the suit. The judgment was affirmed successively by the Supreme Court of the State and by this court. No suit of any kind was commenced by defendant in error to enjoin the construction of or the maintenance of said railroad over said right of way, except the suit at bar, which was brought shortly after the decision of this court above mentioned. The summons was served on the Northern

Pacific Railway Company on the 9th of October, 1901, and the complaint was filed on the 4th of June, 1902.

The Spokane and Palouse Railway Company conveyed the right of way in controversy and all of its property on the 21st of February, 1899, to the Northern Pacific Railway Company, which has ever since maintained and operated said road from Spokane, Washington, to Lewiston, Idaho, and intervening points.

The Northern Pacific Railway Company (we shall follow counsel's example and treat the Northern Pacific Railway Company as the sole plaintiff in error, the individuals named being its lessees,) assigns as error in its brief the ruling of the Supreme Court of the State, that the company "had no right of way under the act of Congress of March 3, 1875," (18 Stat. 482,) and the ruling, "that the statute of limitations of Washington could not, because the laws of the United States forbade, commence to run until patent issued." The limitation of the statute is ten years.

The defendant in error opposes as a bar to these defenses the judgment in his favor in the suit brought by the Spokane and Palouse Railway Company and William S. Powers and others, which judgment was affirmed by this court. 180 U. S. 173. Plaintiff in error is the successor in interest of the Spokane and Palouse Railway Company, and is estopped by the judgment if that company would be.

The object of the suit in which the judgment was rendered, as appears from the findings of fact of the trial court, was to have Slaght, defendant in error, "declared a trustee, and as holding the land in trust" for the plaintiffs in the suit, and to require a conveyance from him to them, and to enjoin him from bringing any action to oust them. The amended complaint, which is made part of the findings, averred that the patent to Slaght was "issued under a misconstruction and misinterpretation of the law," and that at the date of the issuance of said patent the land was not, nor was it at the time he applied to enter the same, public land, subject to settlement or entry under the land laws of the United States, other than the act of Congress approved July 2, 1864, granting land to the Northern Pacific Railroad Company. The facts and circumstances from which these conclusions were deduced and justified were set forth with great particularity. It was averred that the Spokane and Palouse Railway Company and other plaintiffs asserted and claimed title to certain portions of the land under and by virtue of certain instruments duly made and delivered by Powers and his grantees. And it was also averred that the questions involved were of common and general interest to many persons whom it was impracticable to make parties, and that such persons and the plaintiffs were the owners in fee simple and had an inde-

feasible title, and were in possession of lots 10, 11, 14 and 15 of section 1, township 16 N., range 45 E., Willamette meridian, and that Slaght claimed an interest or estate therein adverse to the plaintiffs, which claim was without any right whatever and that he had no estate, right, title or interest whatever in the land or any part thereof. And it was averred that he threatened to commence suits in ejectment, and, without suit, forcibly to dispossess and eject plaintiffs from said premises or a portion thereof unless enjoined. An injunction was prayed restraining him from selling the land and doing the acts described; that he be required to set forth the nature of his claim, and that his claim be determined; that he be adjudged to have no title or interest whatever to the land or any part thereof, and be enjoined from ever asserting any; "that the title of plaintiffs be decreed good, valid, indefeasible fee simple, and free from all claims of said defendant;" that the patent be declared to have issued under a misconstruction of law, that he be held to be a trustee for the plaintiff, William L. Powers, and his grantees, both direct and through mesne conveyance, and that Slaght be required to convey the land to Powers and his grantees. Slaght demurred to the complaint and the demurrer was sustained. The plaintiffs electing to stand on the demurrer, judgment was entered dismissing the suit. This judgment was affirmed by the Supreme Court of the State and by this court, as we have seen.

The complaint in the suit did not show what land or interest Powers deeded to the Spokane and Palouse Railway Company, but it appears from the findings that the Northern Pacific Railroad Company conveyed lots 10 and 11 to Powers in August, 1887, and in September, 1887, Powers conveyed to the Spokane and Palouse Railway Company the tract of land then used as its right of way, and that it is the same tract which was occupied by the plaintiff in error as its right of way. The basis of the title alleged in the suit was the grant to the Northern Pacific Railroad Company by act of Congress of July 2, 1864. Rights under the act of Congress of March 3, 1873, or under the statute of limitations of the State, were not set up. The Spokane and Palouse Railway Company, however, alleged that it and the other plaintiffs in the suit had a title in fee simple, and prayed in the most comprehensive and detailed way to have it quieted against the claims of the defendant in error, which, it was alleged, were threatened to be asserted by suits and by force without suit. The question now to be decided is, is the decree in the suit *res judicata?* Against this effect of the decree the railway company urges that it was rendered on demurrer and "the estoppel extends only to the very point raised in the pleading, and does not bar another action based upon other facts." The effect of the decree, it is insisted, was only to decide against the title specially set forth in the pleading. And further,

"in this action [that at bar] the right asserted is a perpetual easement or way by virtue of the act of 1875 through the lands involved in the former suit. Not only was this right not pleaded in the former complaint, but under it the title now asserted could not have been proved." To sustain these conclusions the following authorities are cited: *Wiggins Ferry Company* v. *Ohio & Mississippi Company*, 142 U. S. 396, 410; *Gilman* v. *Reives*, 10 Pet. 298; Freeman on Judgments, (4th ed.) sec. 267; Van Fleet, Form Ad., sec. 306, and following.

The citations are not apposite to the present controversy. It is well established that a judgment on demurrer is as conclusive as one rendered upon proof. *Gould* v. *Evansville & Crawfordsville R. R. Co.*, 91 U. S. 526; *Bissel* v. *Spring Valley Township*, 124 U. S. 124; Freeman on Judgments, section 267. The question as to such judgment when pleaded in bar of another action will be necessarily its legal identity with such action. The general rule of the extent of the bar is not only what was pleaded or litigated, but what could have been pleaded or litigated. There is a difference between the effect of a judgment as a bar against the prosecution of a second action for the same claim or demand, and its effect as an estoppel in another action between the same parties upon another claim or demand, *Cromwell* v. *County of Sac*, 94 U. S. 351; *Bissel* v. *Spring Valley Township*, 124 U. S. 225; *New Orleans* v. *Citizens Bank*, 167 U. S. 396; *Southern Pacific Railroad Company* v. *United States*, 168 U. S. 1; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273; *Deposit Bank* v. *Frankfort*, 191 U. S. 499, and a distinction between personal actions and real actions is useful to observe. Herman on Estoppel, sec. 92. It is there said: "Although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided, for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated."

In *United States* v. *California & Oregon Land Company*, 192 U. S. 355, this principle was applied. In that case a decree rendered upon a bill in equity brought under an act of Congress to have patents for land declared void, as forfeited, and to establish the title of the United States to the land, was held to be a bar to a subsequent bill brought against the same defendants to recover the same land, on the ground that it was excepted from the original grant as an Indian reservation. And, speaking of the two suits, we

said, by Mr. Justice Holmes: "The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee." And further: "But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim, *Fetter* v. *Beale*, 1 Salk. 11; *Trask* v. *Hartford & New Haven Railroad*, 2 Allen, 331; Freeman, Judgments, 4th ed. secs. 238, 241; and, *a fortiori*, he cannot divide the grounds of recovery."

This doctrine has illustrations in suits to quiet title. It was decided in *Lessees of Parrish* v. *Ferris et al.*, 2 Black, 606, that the judgment in an action to quiet title is conclusive of the title, whether adverse to the plaintiff in the action or to the defendant. In other words, determines the merits of the plaintiff's title as well as that of the defendant. In *Indiana, Bloomington & Western Railway Co.* v. *Allen*, 113 Ind. 581, it was held that the railway company could not assert against a judgment decreeing title in the plaintiff in such an action the right to construct and maintain a railway over it. And in *Davis* v. *Sermen* it was decided that every possible interest of a defendant is cut off. And necessarily every possible interest of the plaintiff is cut off if the judgment is in favor of the defendant. *Parrish* v. *Ferris*, *supra*.

The Spokane and Palouse Railway Company alleged a title in fee simple, and the truth of the allegation could be determined as well by demurrer as by proof, and the same legal consequences followed from it. *Clearwater* v. *Merrideth*, 1 Wall. 25; *Goodrich* v. *The City*, 5 Wall. 566; *Aurora City* v. *West*, 7 Wall. 82; Black on Judgments, sec. 707; Freeman on Judgments, 267, and cases hereinbefore cited. The record shows that the demurrer was not upon merely formal or technical defects, but went to the merits. It was directed to the second amended complaint of the plaintiffs. They elected to stand on that complaint, and declined to plead further. They asserted its sufficiency by an appeal to the Supreme Court of the State and again to this court, and met defeat in both, as we have seen. Whether the Spokane and Palouse Railway Company could have pleaded, in addition to the right it alleged under the deed from Powers, the rights that plaintiffs in error contends it acquired under the act of Congress of 1873, or the statute of limitations of the State, we need not determine. See sec. 97, 120 *et seq.*; Story's Equity Pleading; *Smith et al.* v. *Swormstedt et al.*, 16 How. 288. It elected between those rights and rights under the Powers deed, and we think its grantee is now bound by that election. The interest that the

Spokane and Palouse Railway Company derived from Powers was of the right of way, which is now claimed by plaintiff in error. In other words, plaintiff in error, as successor of the Spokane and Palouse Railway Company, again asserts title to the very property that was the subject of the other suit, the source of title, only, being different. If this may be done, how often may it be repeated? If defeated upon the new title, may plaintiff in error assert still another one, either in its predecessor or in itself, and repeat as often as it may vary its claim? The principle of *res judicata* and the cases enforcing and illustrating that principle declare otherwise.

In the discussion thus far we have assumed, as contended by plaintiff in error, that the statute of limitations could commence to run before the patent issued, and we have also assumed that rights under it were complete in the Spokane and Palouse Railway Company at the time of its suit against Slaght. Lest the latter assumption be questioned it may be well to determine whether the other assumption be true. The Supreme Court decided against it on the authority of *Gibson* v. *Chouteau*, 13 Wall. 92, and *Redfield* v. *Parks*, 132 U. S. 239, that is, decided that the statute did not commence to run until the patent issued to Slaght, and that, therefore, this action was not barred. The ruling, we think, was right. The act of Congress of 1875 and the statute of limitations are independent defenses, and, being so, the latter comes within the rule announced. Of course, if the act of Congress of 1875 was a grant of the right of way *in præsenti*, "conveying a good title when the road was completed," as contended, it needs no aid from the statute of limitations and would be an effectual defense if it were not barred by the judgment which we have considered.

Judgment affirmed.

No. 153.

Northern Pacific Railway Company et al. *vs.* Margaret Slaght. } In error to the Supreme Court of the State of Washington.

[March 11, 1907.]

Mr. Justice McKenna delivered the opinion of the Court.

This case was submitted with No. 152, the questions being identical. On the authority of that case the

Judgment is affirmed.

Mr. Justice Brewer took no part in the decision of these cases.

END OF CASE